IN THE

Supreme Court of the United States,

No. *Term, 186*

THE PITTSBURGH & CONNELLSVILLE R. R. CO.,
Appellants,

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE,
Appellees.

ARGUMENT FOR APPELLANTS.

Printed by Siebeneck & Matthews, 71 Grant Street, Pittsburgh.

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Supreme Court of the United States,

No. *Term, 186*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

THE PITTSBURGH & CONNELLSVILLE RAIL ROAD CO., *Appellants*,

versus

THE MAYOR AND CITY COUNCIL OF BALTIMORE, *Appellees*.

ARGUMENT FOR APPELLANTS.

An inspection of the record will disclose that the merits of the question involved depend wholly upon the validity and legal effect of an Act of the General Assembly of the State of Pennsylvania, passed in April, 1864, and which became a law in August of the same year.

The Pittsburgh and Connellsville R. R. Company had been incorporated in 1836, obtained their letters patent in 1847, and have since, from time to time, received grants of additional powers. But in 1864, the Act above mentioned was passed, alleging in its preamble that the Company had abused and misused their corporate privileges, and proceeding to revoke and annul all grants of charter powers that conferred upon the Company the right to

build or maintain a rail road beyond the town of Connellsville, in Fayette County, to which point the rail road had already been built.

In passing this act of revocation, the Legislature followed the provision of the original charter of 1836, contained in the 20th section, and in the following words:

"SECTION 20. If the said company shall at any time misuse or abuse any of the privileges herein granted, the legislature may resume all and singular the rights and privileges hereby granted to the said corporation; the legislature also reserves the right to purchase the rights of said company and the rail road, with its appurtenances, at any time after thirty years from the passage of this act, paying to said company a sum of money, which, with the tolls received, shall be equal to the cost and expenses of said rail road, with an interest of eight per cent. per annum thereon."

The City of Baltimore, a mortgage creditor of the Pittsburgh and Connellsville R. R. Company, filed a bill against the said company and against the Connellsville and South Penna. Railway Company (a corporation created by an independent act passed contemporaneously with the act of revocation, and to which company the power to build a road *beyond* Connellsville, and to buy those portions of their road already built by the Pittsburgh and Connellsville R. R. Company beyond Connellsville, was granted), alleging the invalidity of the act of revocation, and asking an injunction against the said companies.

The invalidity of the act is alleged to be found in the want of constitutional power on the part of the Legislature of Pennsylvania to revoke and resume the powers granted in the charter of 1836 and its supplements, which are claimed to constitute a contract between the Rail Road Company and the State, inviolable by either party without the consent of the other.

The legal question turns upon the effect of that clause of the charter, already cited, that authorizes the Legislature, in event of any abuse or misuse of their charter privileges by the Company, to revoke and resume the same.

It is claimed, on the part of the City of Baltimore, that the right to exercise this reserved power depends upon the fact of some precedent act of misuse or abuse of charter rights by the Company, and that the existence of that fact of misuse or abuse

must be established by some other tribunal than the Legislature *before* the latter can inflict the penalty of forfeiture. It is conceded that some substantial act of abuse or misuse of charter powers must have been committed by the Company before the Legislature could take away the powers so abused or misused, but the real question is, to what body or tribunal is committed the power of determining the question of the *fact* of abuse or misuse. On the strength of several adjudications, presently to be cited, it is contended that the right and power to determine the question of misuse or abuse belong to the Legislature, and that that body having determined for itself the existence of such abuse and misuse on the part of the Company, the *finding* is conclusive on the courts and all parties.

The reasoning upon which this conclusion is based is set forth at length in the opinions of Judges Black and Lowrie in the case of *Erie and North East R. R. Company vs. Casey*, 2 Casey, 297.

The same conclusion was reached by the Supreme Court of Massachusetts in the case of *Crease vs. Babcock*, 23 Pickering, 334, and in the case of the *Miner's Bank vs. The United States*, 1st Green (Iowa Reports), 553.

It is, therefore, claimed that the Court below erred in directing an inquiry to be made by a jury into the question of fact of abuse or misuse by the Rail Road Company. The Court should have regarded the question as conclusively settled by the action of the Legislature.

It is further claimed that the Court below erred in restricting the jury to the acts and history of the Company since the Act of April, 1856. It is submitted that, in giving effect to this Act as a release or condonement on the part of the State, of all previous acts of abuse and misuse, the Court mistook the real meaning and effect of that Act, which was merely intended to prevent the stockholders and debtors of the Company from setting up alleged irregularities of the Company against their own liabilities.

The principal concern of the Pittsburgh and Connellsville Rail Road Company, in this appeal, is to have the questions involved determined by the Court of the last resort, in order that they may know their duty in the premises. Great injury will be done to important interests, unless the legal position of the Company is soon finally determined. The Company have, accordingly, taken

this appeal, in order to avoid the delay which, it was feared, would otherwise occur in bringing the case before this Court.

The Pittsburgh and Connellsville Rail Road Company, in urging this appeal, do not desire to be understood as complaining of the rulings of the Court below, or of the conclusions reached, but wish to be relieved from the perplexity occasioned by an appeal having been taken by the other party, defendant in the case.

ANDREW STEWART,

Solicitor for the Pitts. and Conn. R. R. Co.

IN THE

SUPREME COURT UNITED STATES.

THE CONNELLSVILLE AND SOUTHERN PENNSYLVANIA RAIL ROAD COMPANY, THE PITTSBURGH AND CONNELLSVILLE RAIL ROAD COMPANY, AND OTHERS, CITIZENS OF THE STATE OF PENNSYLVANIA,

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE, A CORPORATION OF THE STATE OF MARYLAND, AND A CITIZEN OF SAID STATE.

APPELLEE'S BRIEF.

WM. K. BOYLE, PRINTER, BALTIMORE.

bility to save the credit of Co. up to 1857. The attitude of Allegany county securities prevented us from negotiating bonds, &c. Larimer's defalcations embarrassed us—he had $220,000, only recovered $60,000—loss $160,000. After this it was difficult for us to make any negotiations—even of Balt. city bonds and stock very difficult. Bonds issued to Balt. and O. R. R. by city had preference in market—every possible effort was made to sell bonds, stocks, &c., outside of city. Suspension in 1857 was very disastrous to all
363 unfinished railroads. The attitude assumed by repudiators prevented sale in New York, Phila., Baltimore, and Boston. One capitalist in Boston was favorable to a purchase until he heard the road ran into Pittsburg, then he declined having anything to do with the bonds. The repudiation went to principal and int. of all bonds. From 1856 to 1864 there was not an effort made to abandon the completion of the work. Went to Balt., Phila., New York, and Boston, to negotiate means to complete the road; made every possible effort that could be made to complete it. The Balt'e and O. R. R. was interested in its completion, had frequent assurances from Mr. Brooks and Mr. Garrett, both, for assistance. Brooks was a director, and resigned to give place to me as a director and pres't. Aid of one million of dollars was offered in monthly instalments of $100,000; in March, 1864, the entire road was let for construction; in Jan'y, 1864, advertised in Pittsburg, Baltimore, and Cumberland, March 15, '64. (Paper shown. this is a copy of advertisement.) Read. Notice to contractors issued. Read. Various contractors ex-
364 amined the work and made favorable bids.

The bill repealing the charter was passed before the bids were all calculated; letting was postponed for 2 weeks on acc. of violent snow storm; bids were all accepted upon condition that the governor would veto the bill. We had a hearing before the gov. in June following, with a view of obtaining a veto.

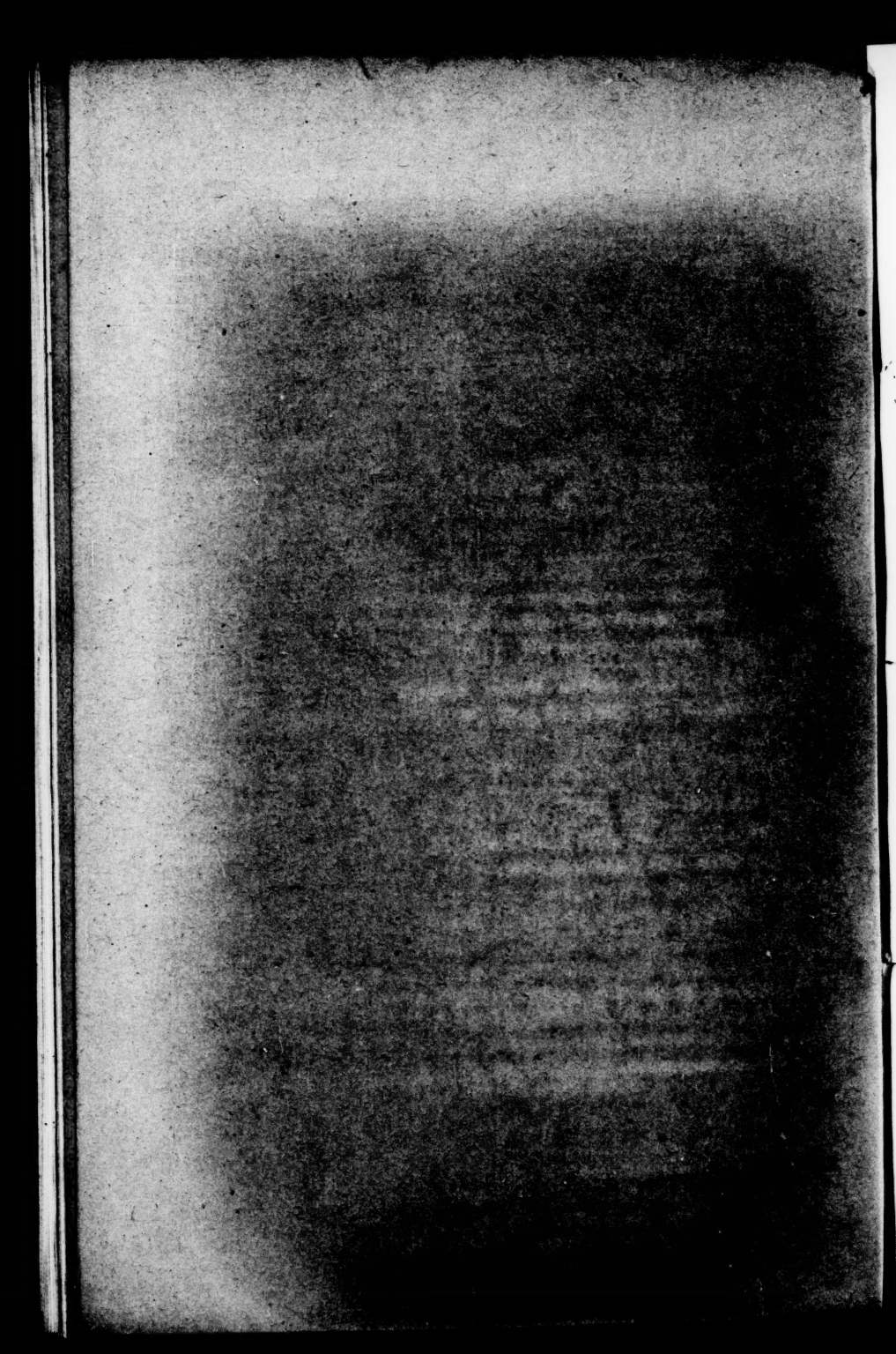
Am an engineer; have been since 1830 constantly; expenditures for the work done I thought reasonable and proper, and carried them out. The contractor on the Sand Patch failed, the work was let at a small advance. Bonds were sold at 75 cts. cash, others exchanged for iron. The receipts and expenditures of the company are correctly stated in the annual reports. If the company had been able to have made all her means available, it would not have been sufficient to complete the work.

Only the 10 miles from Turtle creek, am'ting $250 or $260,000, were paid in bonds. Sum paid for right of way were bonds of the 1st mortgage; do not know that any county or city bonds of Allegany were paid out for construction.

365 The com. of finance of Baltimore city were charged with the duty of seeing the money properly expended, and the committee charged me with that duty—as a condition to the guarantee the bonds, or rather to exchange.

In chief:

Have been an engineer since 1830; connected with B. & O. road



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In chief:

Have been an engineer since 1830; connected with B. & O. road

and Phil'a road. Nearly all railroads are constructed by negotiating bonds, &c.

Horace B. Fry sw'n:

Was banker and broker in 1856 and upwards; my business dealing railroad stocks; lived in Phil'a, now in N. York; counties loaned their credits to railroad co. In 1857 the market was glutted with the number of R. R. bonds; no sale on acc. of repudiation of Pittsburg & Allegany bonds. Int. was paid to 1 July, 1857. The bonds of no unfinished road could have been negotiated in 1857. The act of repudiation affected all bonds. The first was in the Allegany Valley road failing to pay int. Bonds fill to 50 cts. to the dollar. Some sold at 33 cts. on bond and interest thrown in.

366. The Pittsburg, Strubleville, Allegany Valley, & Connellsville, had all about the same amount of discredit. After the failure of the Pa. Bank, 27 or 28 August, 1857, there come a general failure, and it destroyed all opportunities for all railroads except those of the highest credit; there was no chance of obtaining loans; continued until the last of the year; then there was a recovery, but was very gradual, but there was a market of limited extent. There was general distrust thrown upon the securities of unfinished roads; after the refusal to pay interest, and during the litigation the bonds were unsaleable; in 1862 I purchased bonds at 40 cts., with int. on coupons thrown in. In the spring of 1864 I think they might have been sold, provided they had the first liens, and not to exceed 20,000 per mile, and the Connellsville co. could have made as good a bond as the Allegany. A favorable loan could have been negotiated in 1864.

367 A. J. Randell sw'n:

I was clerk to city council from 1857 to 1864. Mr. Latrobe was repeatedly before the councils, and was indefatigable in his efforts to obtain aid. These efforts were favorably received and everything he asked for was granted by the councils; it was through his efforts the the city waived her first mort.

A. L. Russell sw'n:

Entered service of Co. in 1853 to obtain right of way from Pittsburg to Cumberland; in 1857 was chosen secty. and treas.; remained in the Co. until June, 1861. I know that no board of directors could have done more than this board did; had better route; annual reports were regularly made by the officers, and contained a general exhibit of receipts and expenditures of the Co. Not a dollar of the money was expended unless under the supervision of the finance committee. Best men in the city were directors; were interested and frequently aided the road by their personal means and endorsements; was considered of great value to the entire community.

368. The only route east is by the Pa. Central. This would give two trunk lines to the east. The printed reports of 1858, 1859, and 1860, show correct exhibits of the receipts and expenditures of the company. The payments as stated were all passed,

by the finance committee; am not aware of one dollar was improperly expended. The expenditures during my term of office were strictly and necessarily correct.

No questions.

Jas. J. Dull sworn:

I am a contractor on public works; saw the advertisement of this Co.; was a bidder in the spring of 1864; my bids were accepted by the Co.; was prevented by this legislation; filed my bid at Pittsburg; I am a citizen of Harrisburg. The notice of acceptance was given me some months afterwards; these papers were furnished me by Co. to bid from; I bid for all from Connellsville to Turkey Foot except about 6 miles.

369 Benj. H. De Ford sw'n:

I was a director in the Pitts. & Conn. road. Reside in the city of Baltimore; did all their power to finish the road by loaning their credit and otherwise. Mr. Latrobe, by his efforts and those of his friends, were of great service in obtaining means to prosecute the work. After the renewal of the charter, in 1856, they were very zealous to have the work completed, and gave her mortgage for a million. Mr. Latrobe's character as an engineer will compare favorably with any man in the country.

Benj. H. McCreary sw'n:

I reside in the city of Pittsburg; am a member of the board of trade; know Mr. Latrobe very well; have paid particular attention to the efforts of prest. and board of directors; think they did all that men could do. The crisis of 1857 suspended everything, which continued thus until the Turtle creek was commenced. All roads running into Pittsburg were affected except the Pa. Central. Allegany Valley not finished yet; Steubenville finished about one year ago; do not know that Allegany Valley has finished a mile of road for
370 5 or 6 years. Pittsburg and Fort Wayne sold for one dollar per share in 1857; is now worth $3. The effects of the crisis of 1857 was stopped all roads until after the commencement of the war, when money became abundant—was early in the stages of the war, say 1863. From that time forward railroad securities became valuable. Never heard any complaints against *against* the Co. or the prest. particularly.

Samuel Gormly sworn:

Have been a citizen of Pittsburg all my life. There was a universal depression of all values in 1857. All unfinished roads were rendered nearly valueless by the crisis in 1857 and the repudiation movements. National troubles discouraged all enterprises. Bonds could not have been negotiated in 1861 and 1862.

371 Sam'l Dickey sw'n:

Resided in Pittsburg since 1830; am prest. of board of trade. Things were much depressed throughout the country. The

city and county of Allegany were in very bad credit. Allegany Valley stock for $5; Fort W. & C. road at $9. Am intimately conversant with Mr. Latrobe's efforts to obtain money to prosecute this work. We called meeting of the board of trade to enable them to raise means to complete the road; did all that men could do; no improper expenditures that I know of.

Gen'l Russell recalled:

The raising of the means to complete the Turtle creek division there was very great difficulty in negotiating bonds; could not sell them as a whole; had to make personal applications individually to moneyed men.

372 James McCauley sw'n:

I have resided in Pittsburg since 1835; know the condition of the money market; money matters were tight throughout 1856. The primary cause of the panic of 1857 was caused by the failure of Ohio Life Insurance and Trust Co.; then the failure became general. Bonds could not have been negotiated in '61 and '62 unless at ruinous rates. In '63 things brightened up. This Co. could have negotiated their bonds in 1864; do not know whether she had any bonds to sell or not; think this Co. could have borrowed money on favorable terms in 1864; I think upon her character as a Co.

No questions.

Isaac Jones sw'n:

Resided at Pittsburg since 1832. I have been director and prest. of the Stuebenville road; road was under contract for construction bonds; was to be commenced and finished within 12 months. It was prostrated by the panic of 1857; do not think any unfinished road could have obtained a loan. In 1863 and '64 work was commenced; in 1864 a loan could have been obtained on ac't of the great abundance.

373 Alexander Miller sw'n:

I am a resident of McKeesport. This road runs through the town. Money matters were very tight in 1857–'61 and '62; in 1864 money matters very flush. The Pittsburg and Connellsville road could have been obtained on liberal terms.

Jas. L. Graham sw'n:

I reside in Allegany co.; am president of the Allegany Savings Bank. Money matters were tight in 1857 to 1862; was impossible to negotiate railroad stocks and securities; in 1864 could. Allegany Valley stock sold at 60 cts.; F'r't W. and C., $2 50, private sales; Conn. stock, 10 cts. per share. Money was more abundant in 1864 than I ever knew it being; any good security could have been negotiated in 1864.

374 Patrick F. Howley sw'n:

Reside in Allegany co.; saw advertisement for letting the graduating masonry, &c., of Conn. road; bid on both divisions of the road;

bid for one-half; went over the road before I made my bids; bid for about one-half the whole road, in all 7 sections; are in all 86 or 87. All of the contractors that I knew were responsible men. Mr. Dull is responsible, and has the contract for building the Chicago tunnel. All roads were affected by the general depression; got no pay from any roads except the Connellsville, and she has paid me every cent according to contract. The reason I did not go on with my contracts was because I got notice from Mr. Latrobe not to work on acc. of the repeal of its charter.

375 Segismund Lowe sw'n:

I am an engineer of this co. in 1856 and '57; made the location from Connellsville to Cumb. in '57; made to let; laid it out in 1864, sections from those points; route indicated by stakes; was a final location and survey; sections about 1 mile; Md. line was struck in Bedford co., about 8 miles from Cumberland; road made one mile east of Connellsville; tunnel was headed, except about 100 feet; length of tunnel about 4,780; heading is through the tunnel now; can be finished in one year; is the heaviest work on the road. One of my ass'ts went over the route with contractors; bidders were among the best in the country; located in March and April, 1864, had charge of road as ass't and road manager.

In chief, Judge Lowry:

Heading is ; map drawn in 1854 and 1857; drew this map as principal ass't engineer. Flaugherty creek is a branch of Castleman; leave the Md. line at Buchannan's farm, in Bedford co.; was at tunnel in 1857 and 1864; was fallen in some and filled with water; 3 shafts, deepest 157 ft.; about that above the water; was not working in 1864; did not take long time to prepare the work for active efforts.

376 J. J. Atkinson affi'd:

I am sec'ty and treasurer of Balt. O. R. R. Company. Nov. 10, '63, Mr. G.; letter to Mr. Latrobe; read; 11, adopted and approved by the board to give one million of dollars to aid work; own bonds, $170,900; cost, $130,000. August, 1864, and 17 May, 1866; whole cost, $138,962 75. Co. subscribed originally of 700 shares, about 1846, $35,000; now down 23,722 shares in all; of these, 8,022 since M'ch, '61 and '66; was purchased by Mr. Bryan, a banker in Pittsburg, and sent me by Mr. Holmes, of Nat. Bank, (about 34,000 shares in all.) Never heard an unfriendly expression against this Co., but everything on the contrary. The stock (8,022 shares) purchased by Mr. Bryan cost $79,425 14,

377 W. O. Hughart sworn:

I am pres't of the Pittsburg and Conn. road. Feb'y, 1859, I became connected—followed Gen'l Russell as sec'ty and T. in June, '61—continued until, as treas., until 1864. Then become pres't. The reports were carefully prepared, and contained a full and fair exhibit. Show everything by balance sheets and statements. Ex-

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amined the rep'ts, and found them to compare with the books. In 1856 assets were—

374,000 Allegany co. bonds.
269,000 Balt. guaranteed bonds.
266,000 Baltimore city bonds.
386,872 17-100 Baltimore city stock.
100,000 bonds of Connellsville borough.
99,900 bonds of McKeesport borough.
5,000 bonds of A. M. Hill & Co.
860 50-100 bills receivable.
5,000 Man. and Farmers' Bank stock.
179,512 88-100 debts due co., W. Larimer.
1,112 55 sundry small accts.
66,292 92-100 cash with treas.

1,753,551 02 total assets of co.

Net revenue from '56 to '64, (Oct. 31,) 359,690; in addition assets and proceeds, $87,570; capital stock, collections, 8 years, 400,000 bonds, 379,675. Net proceeds of Turtle creek bonds. Aggregate, $2,580,486.

378 W. O. Hughart cont.:

Amount realized, $2,009,579; rate fixed for sale of Allegany county bonds 70 cts.; all sales of Allegany co. 78 13-100 par value; all except 7 bonds of 1,000 each were sold in 1864. They were hypothecated

Expenditures ending Oct. 31, '64 to '64:

$318,720 graduating road, bid, &c.
207,178 tracks, &c.
75,396 right of way.
51,517 real estate.
60,415 station buildings, &c.
118,820 rolling stock.
32,094 engineering.
100,583 general expenses.
19,290 interest acc. on all b'ds.
30,180 Pitts. bonds.
14,074 Balt. securities.
348 commission.
116,204 int. on floating debt.
83,614 T. creek bonds.
5,401 int.
719,579 floating debt, Oct. 31, 788.

1,977,697
909 bills receivable.
8,893 cash.
12,000 sinking fund, (pd. to bal.)

2,009,500

379 W. O. Hughart cont.:

Nothing	$	No. net revenue in 1856, Oct. 31.
$827	41	net revenue in 1857, Oct. 31.
971	98	net revenue in 1858, Oct. 31.
5,588	82	net revenue in 1859, Oct. 31.
21,041	26	net revenue in 1860, Oct. 31.
21,217	06	net revenue in 1861, Oct. 31.
39,437	24	net revenue in 1862, Oct. 31.
95,228	89	net revenue in 1863, Oct. 31.
101,568	72	net revenue in 1864, Oct. 31.
285,881	38	aggregate.

380 Three roads terminating—
Ft. Wayne, 467 miles long.
Steubenville, 43 miles long.
Allegany valley, 44 miles long.
Cleaveland and Pitts., 150 miles long.

No outlet for the western trade but the Penna. Central—is an immense trade to Pittsburg by river from '59 to '61. Reports are correct. All acc. audited and approved and reported to board and by them approved. Prest. and directors; supt. visited western roads, New York. Think of no effort being omitted that could made.

7 bonds left on hand. Balt. bonds exchanged for like amount of other securities. Got city bonds and stock at its face. $15,000 were received for Connellsville bonds. Hill & Co's. bonds, nothing (was returned.) 4 of the 7 bonds have been sold. 2 bonds in suit—1 cannot tell where it is—McKeesport bonds. 47,100 were hypothecated and sold. 52,800 in hands of co. Credit on judg't 9½ per cent., $4,950. Commenced running from West Newton to Connellsville, distance 25 miles, in Sept., 1855. Jan'y, '57, section from W. Newton to Turtle creek was completed, (23)—in all 48 miles div. 1860, Jan'y. Close of '61 Turtle creek div. completed. At the close of '61 a road of 71 miles and branch of 12.

381 In 1856 company had 38,710 shares less the Cumberland stock, 4,000 which was not issued, net am't 34,710. Individual shares 1,511, paid in full. Whole am't paid on individual shares 102,893 31 cts., besides 94,950 paid for R. E. right of way and to contractors (paid in shares) 987,570 of capital stock. Collections in last 8 years was made up as follows:

2	shares for real estate.
45	shares for right of way.
576	shares to contractors.
1,323	old shares to other individuals.
1,946	*a* 50 c. $97,300.

Difference is in partial payments, which is $9,530; this was paid in part previously to 1856. The 1,323 shares were part of original subscriptions. Stock partly unpaid in 1864, 3,853 shares; no share was ever paid away at less than par. The subscription of city and county of Allegany, made in 1853. Can't tell what became of balance of 6,000 shares, 5,932 shares of individual subscription in 1864. 3,853 shares unpaid in part in 1864. Can't tell why that amount is not collected.

382 W. O. Hughart:

The whole amount of capital stock in 1860, (page 24,) $1,755,825 87 cts. Unpaid, 393,41 13, including Cumberland city subscription of $200,000, to be expended in Cumberland. This stock on report of 1856 to '64, both inclusive; total, 2,148,867. McKeesport stock on hand, $52,000. Map and line of location filed about 2 years ago. I know that it was sent to be filed, which is identical with the one in evidence; sent it off with indorsement as required; have not heard of it since.

In chief:

The Connellsville bonds were returned to the borough authorities, for a release of interest and the right to establish a depot in the vicinity of town; depot was necessary near it; severe within 5 miles; McKeesport repudiated; bonds could not be sold; considered the agreement an advantageous one; the co. made $15,000, and the depot privileges; paid interest on Conn. bonds.

J. J. Atkinson, recalled:

Letter from J. W. G. to B. H. L., Jan'y 1, '64, proposing assistance of 1 million as before; congratulations for success in circuit court.

383 W. O. H., cont.:

On Nov.	8, '56.	8 shares to Alex. Guffery, r. way.
	13,	51 shares to McGraw & Fitz, contr's.
		2 Pennock & Hurtz, contr's.
$750.		N. Holmes & Son, balance.
50.		Anderson & Son, cash.
Dec.	12.	40, Thos. Watson & Co., contractors.
	23.	1, Rob't Finan.
		3, Masterson & Gordon.
		1, B. Rafferty.
Jan'y,	57.	4, Mattigan.
		1, P. & Hart.
		66, P. F. Howlay.
Jan'y		25, J. Anderson & Co.
	20.	06, B. Rafferty.
$1,000.		20, John Shotwill, cash old shares.
		31, Rob't Finan, cont.
23 Jan'y,	57.	10, Miller.
	30.	2, McCallum & Co., carpet.
		61, Pat. Mahon, contractor.

IN THE

Supreme Court United States.

THE CONNELLSVILLE AND SOUTHERN PENNSYLVANIA RAIL ROAD COMPANY, THE PITTSBURGH AND CONNELLSVILLE RAIL ROAD COMPANY, AND OTHERS, CITIZENS OF THE STATE OF PENNSYLVANIA.

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE, A CORPORATION OF THE STATE OF MARYLAND, AND A CITIZEN OF SAID STATE.

APPELLEE'S BRIEF.

THE Bill in this cause was filed by the Mayor and City Council of Baltimore, a creditor of the Pittsburgh and Connellsville Rail Road Company, and prayed that an Act repealing in part the charter of the Pittsburgh and Connellsville Rail Road Company, and such portions of an Act incorporating the Connellsville and Southern Pennsylvania Rail Road Company as bestowed upon the latter the rights and franchises of the former MIGHT BE DECLARED NULL AND VOID, FOR WANT OF AN ANTECEDENT JUDICIAL INVESTIGATION INTO THE ALLEGED FACT OF MISUSE OR ABUSE—OR, SHOULD THAT RELIEF NOT BE GRANTED, THAT THE FACT SO ALLEGED MIGHT BE JUDICIALLY ENQUIRED INTO; and also, that the Connellsville and Southern Pennsylvania Rail Road Company might be restrained, by injunction, from interfering with the rights of the Pittsburgh and Connellsville Rail Road Company—that the Governor of Pennsylvania might be restrained from appointing commissioners to value the property of the last named Company, and that the latter might be restrained from accepting or ratifying the Acts of Assembly aforesaid.

The Bill alleges, substantially:

That the Pittsburgh and Connellsville Rail Road Company was incorporated by Pennsylvania to build a road from Pittsburgh to Connellsville, April 3d, 1837.

That on the 18th of April, 1843, the Company was authorized to extend its road to the Maryland line.

That at January session of the Legislature of Maryland, 1853, the same Company was incorporated in Maryland, and authorized to build a road between the Pennsylvania line and Cumberland.

That by various Acts passed by Pennsylvania, between 1837 and 1853, Pittsburgh, Alleghany County, and the boroughs of McKeesport and Connellsville were authorized to subscribe for stock in the Pittsburgh and Connellsville Company.

That on the 25th May, 1853, the Legislature of Maryland authorized the City of Baltimore, the Complainant, to aid, as it might deem expedient, in the construction of the road between Pittsburgh and Cumberland.

That the town of Cumberland was authorized to take stock in the Company, February 27, 1856, by the Legislature of Maryland.

That other Acts were passed by the Legislature of Pennsylvania, recognizing the Pittsburgh and Connellsville Road—on 3d March, April 6th and April 19th, 1854, April 11th, 1856, January 22d, 1857, April 11th and 14th, 1863.

That the Act of April 11th, 1856, declared, "THAT ANY DEFECT OR IRREGULARITY IN THE PROCEEDINGS OF THE BOARD OF DIRECTORS OF THE PITTSBURGH AND CONNELLSVILLE RAIL ROAD COMPANY, OR FAILURE TO COMPLY WITH THE REQUISITIONS OF ITS ACTS OF ASSEMBLY, OR THEIR SUPPLEMENTS, WERE THEREBY REMEDIED AND SUPPLIED: AND THAT THE CHARTER OF INCORPORATION OF SAID COMPANY SHOULD NOT BE AFFECTED OR INVALIDATED IN CONSEQUENCE OF ANY OMISSION OR NEGLECT BY THE COMMISSIONERS OR BOARD OF DIRECTORS TO COMPLY FULLY WITH ITS REQUIREMENTS."

That the Complainant, under the Act of 1853, had loaned its credit to the Pittsburgh and Connellsville Company by endorsing its bonds to the amount of $1,000,000. These bonds not being found available, the Complainant, soon after the condoning Act of 11th April, 1856, to wit: on the 10th June following, exchanged the endorsed bonds for the Complainant's own bonds for the same amount, leaving it to its Commissioners of Finance to provide for the application of the funds as to them might seem best, looking to the early completion of the road.

That up to this time, the Summer of 1856, the road had been built from Connellsville to West Newton only, a distance of twenty-five miles; was operated with two locomotives, two passenger, and a few freight cars; was burthened with a floating debt of $600,000, and was dependent on the Pennsylvania Central Rail

Road Company for communication with Pittsburgh. In 1857, there occurred the well remembered commercial crisis, which affected the prosecution of all public works; and scarcely had this passed before the political troubles, which culminated in the late rebellion, commenced, and paralyzed, for a time, every kind of industry.

That, notwithstanding these adverse circumstances, however, the Company, by the 1st of January, 1864, had completed sixty miles of their road from Pittsburgh eastward; had become independent of the Pennsylvania Central Rail Road; had leased a road twelve miles in length, from Connellsville to Uniontown, and were operating the whole seventy-two miles, with all the necessary appurtenances of switches, water stations, &c., with twelve locomotives, and ample passenger and freight cars; had paid off their floating debt; had done one-half of the heavy work of a tunnel through the crest of the Alleghanies, dividing the waters of the Potomac and the Ohio; had obtained the right of way to the Maryland line; had a gross revenue for 1863 of $215,000, and had $95,000, clear of all expenses, to be applied to the further extension of the road, or actually expended upon it.

That in addition to the above, the Company had secured the co-operation of the Baltimore and Ohio Rail Road Company, which had agreed to advance $100,000 per month to the extent of $1,000,000, for the further prosecution of the work; and the Complainant had agreed to raise its mortgage for $1,000,000, so as to allow parties who would advance the sums required to complete and work the whole road, between Pittsburgh and Cumberland, to come in as first mortgagees.

That it was reasonably to have been supposed, that the facts being as here stated, the Company, whose delays, if any, prior to 1856, had been condoned by the Act of that year, would have found favor with the Legislature of Pennsylvania—but so it was, that in the month of April, 1864, the Legislature passed "An Act relative to the Pittsburgh and Connellsville Rail Road Company," which was presented to the Governor on the 29th of that month, and not being returned by him "within three days after the meeting of the Legislature in Extra Session," became a law without his signature.

That, by this Act, the Charter of the Pittsburgh and Connellsville Rail Road Company, so far as it authorized the construction of the road South or East of Connellsville, was repealed, and the rights thereby granted were revoked, and resumed by the State.

THAT THE REASON FOR THIS REPEAL, AS STATED IN THE PREAMBLE OF THE ACT, WAS THE ALLEGED MISUSE AND ABUSE OF THE COMPANY'S CORPORATE POWERS.

That at the same time, an Act was passed "to incorporate the Connellsville and Southern Pennsylvania Rail Road Company." This Act, also, became a law by the failure of the Governor to return it within the constitutional limit.

That it authorized the construction of a road, *inter alia*, from Connellsville to the State line, over the route which had been surveyed, adopted, and, in part, constructed by the Pittsburgh and Connellsville Rail Road Company, between Connellsville and Cumberland, in the State of Maryland; and it further authorized the Governor to appoint commissioners to appraise such work as had been done by the Pittsburgh and Connellsville Rail Road Company, South and East of Connellsville, which the Connellsville and Southern Pennsylvania Rail Road Company was required to pay for. (See the record, pp. 1—10.)

To the foregoing Bill the Pittsburgh and Connellsville Rail Road Company filed an answer, assenting to the relief prayed, (see p. 10 record) and the Defendants demurred and pleaded. (See record pp. 11, 12, 13.)

The Demurrer alleged:

1. That no sufficient ground of relief was stated in the Bill.
2. That the Complainant, being a creditor only, had charged no collusion between the Defendants and the Pittsburgh and Connellsville Rail Road Company to impair or defeat its mortgage.
3. That the Complainants had not sufficiently described their route South and East of Connellsville, to enable the Defendants to confess or deny any intent to interfere therewith.
4. That the Acts of Assembly of Pennsylvania, of 1864, were not set forth *in extenso*, or made parts of the Bill.
5. That certain parts of the Bill particularly mentioned were either irrelevant or scandalous and impertinent.

(See record p. —.)

The Plea relied on the pendency of a suit by the Pittsburgh and Connellsville Rail Road Company of Maryland, raising the same questions, as a sufficient bar to the suit.

The first, or general, demurrer raised the main question involved. The special demurrer and the plea raised preliminary questions.

It was contended, in reply to the second, that it was unnecessary to charge collusion between the Defendants and the Pittsburgh and Connellsville Rail Road Company.

That the complaint was not against the Pittsburgh and Connellsville Company and the Defendants, as colluding to injure the Complainant, but sought to make void the Act of the Pennsylvania Legislature, which,—in violation of the Constitutions of the United States, and the State of Pennsylvania, respectively, without probable cause even,—had attempted to impair rights vested in the Complainant as a creditor and mortgagee; and injunction was asked against the Pittsburgh and Connellsville Rail Road Company, least, by accepting the repealing Statute, it might give to it an apparent validity, to the prejudice of the Complainant. The application was in the nature of a *quia timet.*

Dodge *vs.* Wolsey, 18 Howard, 334.
Mott *vs.* Pennsylvania Rail Road Company, 6 Casey, 1.
Wheeling Bridge Case, 15 Howard, 518.

It was further contended and insisted that, pending the question of the validity of the Pennsylvania Act authorizing the construction of a road over a route, whereon the Pittsburgh and Connellsville Rail Road Company was alleged to have the prior right of choice, the Connellsville and Southern Pennsylvania Rail Road Company ought to be restrained from doing anything to prejudice it; and that it was enough to charge that the location of the Pittsburgh and Connellsville Road had been established, the work thereon in part executed, and the title to the land required obtained, and the fact, generally, of interference.

The answer to another ground of demurrer was, that the Acts referred to were *quasi* public acts, of which the Courts would take notice without their being set forth *in extenso* or made parts of the Bill. *Angell & Ames*, 635. 9 *Cowan*, 205, 206. 3 *Harrington*, 90.

In regard to the last ground of demurrer, it was insisted that it was founded upon an entire misconception of the scope of the Bill, which seeking to show that there had been no misuse or abuse to justify the repealing Act of Pennsylvania, properly set forth, in detail, all those facts and circumstances which were relied on to refute the charge—and, therefore, properly, gave a history of the Pittsburgh and Connellsville Rail Road Company to show that it had performed its duties, and used all the dili-

gence that could be required of it, under its contract with the State.

As to the Plea—any effect of the pendency of the suit of the Pittsburgh and Connellsville Rail Road Company of Maryland against the Defendants, which had been pleaded in bar, was obviated by the dismissal of the Bill in that case, by the Complainants.

The proper replication to the plea having been filed and a joinder in demurrer, the case came on to be argued at Williamsport, Pa., before judges Grier and McCandless, at the June term of the Circuit Court for the Western District of Pennsylvania, when the following opinion was filed and order passed:

Opinion of the Court at June Term, 1865.

The single question for decision in this case is correctly stated in the argument of the learned counsel for the Respondent, as follows:

The charter of the Pittsburg and Connellsville Rail Road Company contains the following provision, viz: "If the said Company shall at any time misuse or abuse any of the privileges herein granted, the legislature may resume all and singular the rights and privileges hereby granted to such corporation."

Under this clause, the Legislature, by an Act passed in 1864, revoked and resumed all and singular the rights and privileges granted to said Company, so far as the same authorized it to construct any line or lines of Railway southwardly or eastwardly from Connellsville.

Is this repealing Act repugnant to the Constitution of the United States, on the ground that it impairs the obligation of the contract between the state and the Company?

The objections made on the argument to the form of the pleadings and the right of the Complainant to have the remedy sought in his bill, will be found overruled in a similar case by the Supreme Court. We refer to the case of Dodge *vs.* Wolsey, 18th Howard, 336. In that case the Complainant was a stockholder in the corporation, whose interests were likely to be injuriously affected by the State legislation, if it should be carried into effect. In this case the Complainant is a creditor, who, on the faith of Legislative Acts, granting certain franchises and privileges to the Pittsburgh and Connellsville Rail Road Company, has advanced

large sums of money, which have been expended in constructing their Road. If that corporation submit to this Act of the Legislature, divesting them of the most valuable part of their franchises, the security and rights of the Complainant would be materially injured. The bill is in the nature of a bill *quia timet*, and the Complainant has a right to the remedy sought, if the Court should be of opinion that the Act of 1864 impairs the obligation of the original contract, or Act of Incorporation granted to the Pittsburgh and Connellsville Rail Road Company.

The only question then is as to the validity of this Act. That the Act repealing the franchises of the corporation, or a material part, and transferring its franchises and property to another corporation without its consent, impairs the obligation of the original contract, is not and cannot be denied. Nor is it denied that an Act granting corporate privileges to a body of men who have proceeded on the faith of it to subscribe stock and borrow money, and expend it in the construction of a valuable public improvement, is a contract, and that it is not in the power of either party to it to repudiate or annul it without the consent of the other.

The State claims no sovereign power to repudiate its contracts or defraud its citizens, and the Constitution delegates no such power to the Legislature.

If in the Act of Incorporation the Legislature retains the absolute and unconditional power of revocation for any or no reasons; if it be so written in the bond, the party accepting a franchise on such conditions cannot complain if it be arbitrarily revoked; or if this contract be that the Legislature may repeal the Act whenever, in its opinion, the corporation has misused or abused its privileges, then the contract constitutes the Legislature the arbiter and judge of the existence of that fact.

But the case before us comes within neither category. The contract does not give an unconditional right to the Legislature to repudiate its contract, nor is the Legislature constituted the tribunal to adjudge the question of fact as to the misuse or abuse. Moreover the case before us admits that the condition of facts upon which the Legislature are authorized to repeal the Act, does not exist. It admits that the corporation has neither "misused or abused its privileges." A charter may be vacated by the decree of a judicial tribunal in a proper proceeding for that purpose, without ony such reservation in the Act. Then both parties are heard and a verdict of a jury on the facts can be obtained, which concludes the question. But the Legislature possesses no judicial authority under the Constitution, and has no established course of proceedings in the exercise of such power.

The party who is injured by its action is not heard. The reasons usually alleged in the preamble to such acts are the mere suggestions of some interested party, seeking to speculate at the expense of others—professional solicitors who infest the lobby are ever ready, for a sufficient consideration, to impose on the good nature of honest but often careless legislators, by the suggestion of any necessary falsehood.

If any one should feel curious as to the methods used by agents of corporations to obtain such Legislative Acts as may be desirable, they will find them fully exposed in the opinion of the Supreme Court, delivered in the case of Marshall *vs.* the Baltimore and Ohio Rail Road Company, 16th Howard, 333.

We do not intend even to insinuate that any such *secret service* by "*skillful* and *unscrupulous agents*," "*stimulated to active partnership by the strong lure of high profits*" to use "*most efficient means*" to get the vote "*of the careless mass of legislators*" have been used in this case. But we do say that the recitals in the preamble to this Act exhibit a labored attempt to justify a more than doubtful exercise of power by an array of reasons which, even if true in fact, might be demurred to in law as insufficient.

The Act does not contemplate the exercise of the right of domain by which the property of individuals or corporations may be taken for some public use on making ample compensation. Its object is to transfer the franchises and property of one corporation, anxious by every means in its power to complete a valuable public improvement, to another whose interest is *not* to complete the road, and who are not required to do so at any time in this or the next century.* Where in a case like the present, the Legislature are asked to take the property of one corporation and give it up to another on the ground that one has abused or misused its privileges, the just and proper mode would be to pass a resolution ordering the Attorney General to institute the proper legal proceedings to ascertain the fact of "misuse or abuse." If such issue be found true, then that the charter be revoked or resumed. We do not say that without such judicial proceeding ascertaining the

* Note—It is proper to say, that, in the argument, the interest which the Pennsylvania Rail Road Company had in preventing the construction of the competing road, which would exist on the completion of the Pittsburg and Connellsville Rail Road to Cumberland, and its connection, there, with the Baltimore and Ohio Rail Road, and the well known influence of the Pennsylvania Rail Road Company in the Legislature of Pennsylvania, were referred to, more than once, as explaining the passage of the Repealing Act, and the incorporation of another company, professedly designed to complete the connection with Cumberland, but whose projectors would take good care that it never interfered with the monopoly of trade enjoyed by the Pennsylvania Road.

existence of the condition in which the right of repeal is reserved, the Act is absolutely void; *but we do say* that in all such cases the party injured, if he denies the existence of such "misuse or abuse," has a right to be heard, and to have that question tried before he shall surrender his property or his franchise. We do not think it necessary to notice the numerous and conflicting cases which have been brought to our notice by the learned counsel.

In the case of the Erie and N. East R. R. *vs.* Casey, 26th Pennsylvania, and 1st Grant, the Court found, after a full hearing of the parties, that the fact of "misuse or abuse" did exist, and therefore the Act was not void.

It cannot, therefore, be any precedent for a case which admits that such facts do not exist. The principles of law, so far as they affect this case, are very clearly and tersely stated by Chief Justice Lewis, in his opinion to be found in 1st Grant, 275, with a review of the cases and a proper appreciation of that from Iowa.

The sum of the whole matter is this:

1. The Complainant has shown a proper case for the interference of the Court in his favor.

2. That the Act complained of is unconstitutional and void under the admissions of the case.

3. The Complainant is entitled to the decree of the Court on the pleadings as they stand.

4. That the Defendants have leave to withdraw their demurrer and answer over; and if they shall so request, an issue will be ordered to try whether the Pittsburgh and Connellsville Rail Road have misused or abused their charter.

I am authorized to say my brother McCandless fully concurs in this opinion.

Bill dismissed as to the Governor, as his acts can do neither harm nor good to either party. Respondents have thirty days to file answer and request issue. If not done at that time final decree, according to the Prayer of the Bill. *Per curiam.*

R. C. GRIER.

The Defendants, in pursuance of the leave granted by the Court, withdrew their demurrer, and filed answers to the Bill, (see Record, pp. 19—42,) and the Complainants, setting down the case for final hearing on Bill and answer, it came before the Court at November Term, in Philadelphia, accordingly.

After full argument, the Court pronounced the following opinion:

Court's Opinion, in Philadelphia.

This case was first heard on demurrer to the Bill. As the demurrer admitted the truth of the facts stated in the Bill, the Court decided, that assuming the statements of the Bill to be true the Complainants were entitled to the remedy sought, and that the Act of Assembly complained of was void. But the Respondents were permitted to withdraw their demurrer and answer the Bill. They have accordingly filed the answer. To this Complainants have filed no replication, but have set their case for hearing on Bill and answer. They have, therefore, undertaken to prove their case by the admissions of the answer. Where the answer positively denies any fact averred in the Bill, the Complainant must rebut it by the testimony of two witnesses, or their equivalent. Where the Respondent does not admit any fact stated in the Bill, but protests his ignorance of its truth, he does not, thereby, admit its existence. and if it be material to Complainant's case, it must be proved by affirmative testimony.

If the Respondents had entered a simple and absolute disclaimer and renunciation of all interest in the subject of the demand, yet as the Complainant showed sufficient reason for *fearing* that the Respondents might interfere with his rights, having power given them so to do in their Act of Corporation, he would have been entitled to a final decree, notwithstanding the disclaimer by Respondents of their present intention to interfere with the rightful claim of the Complainant.

But the Defendants have a right both to disclaim and answer—provided the disclaimer and answer are not inconsistent.

The answer does not admit the statements of the Bill, as to the interest of the Complainants, and their consequent right to entertain this Bill, but professes entire ignorance on the subject.

The Respondents, while they disclaim all intentions of acting on the assumption of the validity of the Act of 1864, which is the subject matter of complaint in the Bill, nevertheless do not admit its validity, or the truth of the allegations of the Bill, as to the facts of "misuse or abuse" of their charter.

The Bill admits* that the Act of Assembly is not to be pre-

* NOTE—The Court seems here to have overlooked the prayer of the Bill in this connection—which is as follows:

"And that the said Act repealing the Charter of the Pittsburgh and Connellsville Rail Road Company, and such portions of the Act incorporating the Connellsville and

sumed to be void, or its recitals false, that it is *prima facie* evidence of a just repeal of the charter, and prays "that the validity of the Repealing Act may be made the subject of judicial enquiry, and that the Complainants may have the opportunity of proving that the Pittsburgh and Connellsville Rail Road Company have neither misused nor abused their privileges." The burthen of proof, therefore, is assumed by them.

The Respondents, while they disclaim any intention of availing themselves of the privileges given by their charter, in case the Act of 1864 should be adjudged to be void, refuse to take upon themselves the burthen of proving its validity. They allege that a writ of *quo warranto* was issued May 11th, by the Supreme Court of Pennsylvania, and an information filed by the Attorney General, against the Pittsburgh and Connellsville Rail Road Company, that the Company has appeared by counsel and filed a plea to said information, and that this case is still pending and undetermined.

Now, although the initiation of this proceeding, since the filing of the Bill, cannot have the effect of removing the consideration of the question from the jurisdiction of this Court—yet the pendency of such a proceeding, in the proper Court for the purpose of determining the question between the State and the Corporation, may be a reason for postponing the consideration of this case, as the judgment of the Supreme Court in that case, would be conclusive on all parties.

The Complainants are not in a situation to demand a final decree in their favor, but are permitted to file a replication—and if the question be not finally and conclusively settled by the State tribunal *before the next term of this Court*, may have an issue ordered, to be tried by a jury, in which according to the prayer of their Bill, they may have "*an opportunity of proving that the Pittsburgh and Connellsville Rail Road Company have neither misused nor abused their privileges*"—and if the issue in the Supreme Court

Southern Pennsylvania Rail Road Company, as bestow upon the said last mentioned Company the rights and franchises of the Pittsburgh and Connellsville Rail Road Company, *may be declared null and void for want of an antecedent judicial investigation* into the alleged fact of misuse or abuse by the said Company of its Charter, rights and privileges; and, should your Honors not grant such relief, that the alleged fact of misuse or abuse of the privileges or any of them, granted to the Pittsburgh and Connellsville Rail Road Company, by the Charter thereof, may *be now* judicially enquired into in a way to afford your Orators an opportunity of shewing that the said Pittsburgh and Connellsville Rail Road Company have used the greatest diligence in prosecuting their work, without either misuse or abuse of the privileges or any of them conferred upon them, and that the action of the Legislature of Pennsylvania annulling their Charter South and East of Connellsville may be declared null and void."

of the State be decided in favor of the Company, the Complainant may allege the fact in a supplemental bill, and will be entitled to a FINAL DECREE. If, on the contrary, the charter of the Pittsburgh and Connellsville Rail Road Company be annulled in that proceeding, the Defendants may allege that fact in a supplemental answer or cross bill, and the bill will be ordered to be dismissed.

It is wholly unnecessary to notice the *other* murmurings of the answer, or charges of dishonesty, fraud, &c., made in the argument of the case.

IT IS ORDERED, that the Complainants have leave to file a replication to the answer, and have an opportunity to try the question of misuse or abuse before a jury—if that question be not previously adjudged by the Supreme Court of Pennsylvania, in the information filed by the Attorney General for that purpose.

R. C. GRIER, *Circuit Judge.*
WILSON McCANDLESS, *District Judge.*

For the Replication of the Complainants filed in accordance with the permission of the Court, *see Record,* pp. 44, 45.

The Court having, in its last opinion, declared that "if the question was not finally and conclusively settled by the State tribunal before the next (May) term of the Court, the Complainants might have an issue to be tried by a Jury, in which they might have an opportunity of proving that the Pittsburgh and Connellsville Rail Road Company had neither abused nor misused their privileges;"—and there having been no decision in the *quo warranto* case by the State tribunals—the Complainants, at May term, asked for the issue, promised, in such event, by the Court.

On the part of the Defendants it was objected that the *quo warranto* was still undetermined,—that the ill health of the Attorney General, who controlled the case, had delayed its prosecution,—that but one of the Defendants' counsel was present, and that to press the trial of the issue would operate a surprise under the circumstances; that the proper course was to frame the issue at this term, put the case on the calendar on the law side of the Court, and let the trial take place at the November term.

The Court, Judge McCandless, after saying that the Defendants had had ample notice, directed the issue to be tried, and fixed the 18th June for the trial at Williamsport—whereupon the

following issue was made up and placed on the Common Law Docket, to be tried at Williamsport, June 18th, 1866. *See page 45 of Record* for the orders of the Court directing the trial of the issue.

The Issue Tried by the Jury.

THE MAYOR AND CITY COUNCIL OF BALTIMORE
vs.
THE CONNELLSVILLE AND SOUTHERN PENNSYLNANIA RAILWAY COMPANY.

No. 7, MAY TERM, 1866.

ALLEGHENY COUNTY, STATE OF PENNSYLVANIA, } *ss.*

The Mayor and City Council of Baltimore, a corporation and citizen of the State of Maryland, complain of The Connellsville and Southern Pennsylvania Railway Company, a corporation of the State of Pennsylvania, and citizen of the said State, of a plea of trespass on the case upon promises: For that whereas heretofore, to wit, on the first day of May, A. D. 1866, at the County aforesaid, a certain discourse was had and moved by and between these Plaintiffs and said Defendants, wherein a certain question then and there arose; that is to say whether The Pittsburgh and Connellsville Rail Road Company, a corporation of the State of Pennsylvania, had, prior to the 19th day of April, A. D. 1864, misused or abused their corporate privileges within the true meaning of the Act of incorporation of said Company, and the supplements thereto; and in their discourse the said Plaintiffs then and there asserted that the said The Pittsburgh and Connellsville Rail Road Company had not, prior to the said 29th day of April, A. D. 1864, either abused or misused their corporate privileges within the true meaning of their Act of Incorporation, and its supplements; which said assertion and affirmation the said Defendants then and there contradicted and denied, and then and there asserted and affirmed the contrary thereof; and thereupon afterwards, to wit, on the day and year aforesaid, at the County aforesaid, in consideration that the said Plaintiffs at the special instance and request of the said Defendants, had then and there paid to the said Defendants the sum of five dollars, lawful money of the United States of America, they, the said Defendants, then and there undertook and faithfully promised the said Plaintiffs to pay the sum of ten dollars of like lawful money, if the said The

Pittsburgh and Connellsville Rail Road Company had not, prior to the said 29th day of April, A. D. 1864, misused or abused their corporate privileges within the true meaning of the Act of Incorporation of said Company, and its supplements; and the said Plaintiffs in fact say that the said The Pittsburgh and Connellsville Rail Road Company had not prior to the said 29th day of April, A. D. 1864, either misused or abused their corporate privileges within the true meaning of their Act of Incorporation and its supplements, whereof the said Defendants duly had notice, whereby the said Defendants then and there became liable to pay and ought to have paid to the said Plaintiffs the said sum of ten dollars; yet the said Defendants disregarding their said promise and undertaking, have not paid the said Plaintiffs the said sum of ten dollars or any part thereof, though often requested: to damage of the said Plaintiffs of the sum of ten dollars, to recover which and costs they bring this suit.

GEORGE SHIRAS, JR.,
Plaintiffs' Attorney.

And the said Defendants by Walter H. Lowrie, their Attorney, come and defend the wrong and injury when, &c., and say that the said Plaintiffs ought not to have and maintain their aforesaid action thereof against them, because they say that though it is true that the said discussion was had and moved by and between the said Plaintiffs and the said Defendants, wherein the said question did arise as aforesaid, and that these Defendants did undertake and promise in manner and form as the said Plaintiffs have above alleged in that behalf, nevertheless, for plea in this behalf the said Defendants say that it is not true as alleged in the said declaration, that the said Pittsburgh and Connellsville Rail Road Company had not, prior to the said 29th of April, A. D. 1864, misused or abused their corporate privileges within the true meaning of their Act of Incorporation and its supplements in manner and form as the said Plaintiffs have above in that behalf alleged, and of this the said Defendants put themselves upon the country.

W. H. LOWRIE,
For Defendants.

And the said Plaintiffs do the like.

GEORGE SHIRAS, JR.,
For Plaintiffs.

Williamsport, June 18th, 1866.

On the 18th of June the Court met at Williamsport, Judge McCandless on the Bench, Judge Grier being prevented from sitting by temporary indisposition.

On the 22d, the Jury was empannelled and sworn. *See Record, page* 47.

And after a protracted trial and the examination of numerous witnesses, rendered a verdict to the effect that the Pittsburgh and Connellsville Rail Road Company did not misuse or abuse its corporate privileges within the true meaning and intent of its Act of Incorporation and the supplements thereto.

For the verdict of the Jury, see Record, page 49.

During the progress of the trial the following offers were made and allowed, or overruled by the Court, to wit:

"The Plaintiffs present the following propositions of law:

"1st. That the question of the right of the Pittsburgh and Connellsville Rail Road Company to build their road to the State line, and to there connect with any other improvement, whether canal or rail road, is a question of law arising under their Act of Incorporation and the supplements thereto, and under the averments of the bill that such question of law has been heretofore argued by counsel and decided by the Court, and is not now open for argument before the jury.

"2d. The Court is requested to instruct the jury: That the question whether the Pittsburgh and Connellsville Rail Road Company have the right, under the legislation of Pennsylvania pertaining to said Company, to build their road to the State line, and to there connect with another rail road authorized by the State of Maryland, is a question of law dependent upon the construction of the said Company's original Act of Incorporation, and the supplements thereto; and that the decision of the said question is for the Court and not for the jury under the issue they are to try.

"Defendants then made the following offers:

Offer No. 1.

"The Defendants, to maintain the issue on their part, now offer to show that the Pittsburgh and Connellsville Rail Road Company had at, and immediately before, the time of the passage of the Act of Assembly of 11 April, 1864, on their book 7,747 shares of

stock unpaid and yet uncollected, and that the said Company has not yet collected the same, or made the slightest effort to do so, but allowed and do yet allow the same to stand unpaid, and that so the State has been defrauded and wronged by the said Company, and is wilful omission to perform the plain duty of collecting the stock subscribed, and appropriating it to the work undertaken to be done.

"The Plaintiffs object to the foregoing offer because—

"1st. That the evidence offered does not prove or tend to prove any act of misuse or abuse by the Pittsburgh and Connellsville Rail Road Company of any of the privileges granted by their charter, within the true meaning of their Act of Incorporation and its supplements.

"2d. That the offer is to disclose alleged acts of abuse or misuse not set forth in the Repealing Act of 1864.

"3d. The offer does not propose in its terms to restrict the evidence to facts between the 11th day of April, 1856, and the 29th day of April, 1864.

"*Per curiam:* This offer is overruled; proceed with another branch of your case.

"*Per curiam.*

Offer 2d.

"The Defendants by way of proving and maintaining the issue on their said offer to show that the Pittsburgh and Connellsville Rail Road Company did, prior to the 11th day of April, 1864, to wit, some time during the year 1847, misuse and abuse its privileges and franchises in this: that the said Company did corruptly and wrongfully, and in direct violation of its charters, abandon the work which by accepting its charter it undertook to do, and transferred its privileges to another association for the purpose of making another road running from Pittsburgh to the Ohio State line; and the Defendants propose to follow this by showing that the fraud, so as aforesaid committed by the Pittsburgh and Connellsville Rail Road Company was taken advantage of by the stockholders, who refused to pay their subscriptions, and in consequence thereof the said Pittsburgh and Connellsville Rail Road Company, is now and has been ever since unable to collect the said stock, and thereby is and has been by its own fraud and corruption been deprived of its means to make the said road.

"The Plaintiffs object to the foregoing offer—

"1st. Because the act complained of was done under and by virtue of an Act of Assembly of Pennsylvania, approved 15th of

March, 1847, and was therefore neither abuse nor misuse within the meaning of the charter of the Pittsburgh and Connellsville Rail Road Company.

"2d. Because the act proposed to be proven took place prior to the 11th day of April, 1856, the date of the Condoning Act.

"The offer is overruled.

"*Per curiam.*

Offer No. 3.

"Defendants now offer to prove that the Pittsburgh and Connellsville Rail Road Company, prior to 29th April, 1864, to wit, about the year 1855, did abuse and misuse its franchises by wilfully, fraudulently and illegally taking possession of a part of the canal belonging to the State of Pennsylvania, in the City of Pittsburgh; that the present State authorities, to wit, the Canal Commissioners, commenced legal proceedings against the said Company and compelled it to remove its road from that place by the final decree of the Supreme Court.

"The Plaintiffs object to the foregoing offer because—

"1st. The act proposed to be proved was not an act of abuse or misuse within the true meaning of the Act of Incorporation of the Pittsburgh and Connellsville Rail Road Company.

"2d. Because the said act is not alleged against said Company as a ground of such repeal by the Repealing Act of 1864.

"3d. Because the act proposed to be proven took place prior to the Act of 1856, condoning the previous conduct of the said Company.

"Offer overruled *per curiam.*

Offer No. 4.

"The Defendants now offer to prove that the Pittsburgh and Connellsville Rail Road Company did, prior to the Act of 29th April, 1864, abuse and misuse its franchises in this: that said Company procured, by the solicitation of its officers and corporators, and other agents, appointed for that purpose, a subscription to be made to its capital by the City of Pittsburgh to the amount of $500,000; and another subscription of $750,000 by the County of Allegheny, taking therefor the bonds of the said city and county, on which the said Company promised that it would pay the interest, and save the said city and county therefrom harmless and indemnified; but the said Company falsely, fraudulently, in violation of its charter, and against the law of the land did negotiate and sell the bonds so taken, squandered the proceeds, and then refused to pay the interest or any part thereof, but suf-

fered it to accumulate until the present time, whereby the said Company has become inextricably involved in debt, totally without credit and the means of making any part of the work which it undertook to make.

"The Plaintiffs objects to the foregoing offer—

"1st. Because the acts proposed to be proved are not acts of misuse or abuse within the meaning of these terms in the charter of the Pittsburgh and Connellsville Rail Road Company.

"2d. Because such acts are not complained of by the City of Pittsburgh and the County of Allegheny.

"3d. Because said acts are not stated as ground for repealing said charter, in the Repealing Act of 1864.

"4th. Because some of the said acts were anterior to the date of the Condoning Act of 1856, and were remedied, if irregular, by the terms of that Act.

"Offer overruled *per curiam.*

Offer No. 5.

"The Defendants now offer to prove that the Pittsburgh and Connellsville Rail Road Company did, prior to the Act of 29 April, 1864, abuse and misuse its charter privileges in this: that the said Company falsely, fraudulently and illegally cheated the City of Pittsburgh and County of Allegheny out of the sum of one million two hundred and fifty thousand dollars in bonds, on which said Company promised to pay the interest, by negotiating and transferring said bonds, and then refusing to pay the interest, and also by misapplying the proceeds of said bonds to the great detriment of said city and county, and to the discredit of the Commonweaith, and this subsequent to the 11th of April, 1856.

("Mr. Cuyler's interlineation between the fifth and sixth lines from the bottom was made before being overruled by the Court, June 25, 1866.—J. D. R)

"The plaintiff objects to the foregoing offer—

"1st. Because the acts alleged are not acts of abuse or misuse within the meaning of the act of incorporation of the Pittsburgh and Connellsville Rail Road Company.

"2d. Because the acts alleged in the offer are not complained of by the city of Pittsburgh or the county of Allegheny.

"3d. Because after the date of said acts, or alleged acts, the Legislature of Pennsylvania have continued, by various acts now in evidence and constituting supplements to the charter, to recognize the said Company as an existing and legal corporation.

"Offer overruled *per curiam.*

Offer No. 6.

"The defendants now offer to prove that the Pittsburgh and Connellsville Rail Road Company, prior to the Act of 29th April, 1864, did misuse and abuse its franchises and privileges, in this: that in the year 1861, or thereabouts, it failed, and fraudulently refused to pay the interest on the bonds of the city of Pittsburgh and the County of Allegheny, and caused the whole burden of paying such interest to be thrown upon the said city and County, and in consequence thereof, not only the said Company became utterly without credit, but the said city and County became so embarrassed that upon suits against them by the holders of said bonds, their stock in said Company was sold at marshall's sale for about one-sixth of one per cent. on their par value; the President of said Company buying in said stock for the use of the Baltimore and Ohio Rail Road Company, a foreign corporation.

"The Plaintiffs object to the foregoing offer—

"1st. Because the acts proposed to be passed are not stated as grounds for repealing the charter in the repealing Act of 1864.

"2d. Because if true, said acts could only be complained of by the city of Pittsburgh and County of Allegheny, who have not so complained, and who are not parties to this issue.

"3d. Because, even if true, they are not such acts of abuse or misuse as to come within the meaning of these terms in the charter of said Company.

"5th. Because said depreciation of the stocks of the Pittsburgh and Connellsville Rail Road Company on the bonds of the city of Pittsburgh and County of Allegheny was owing to their own failure to pay the interest upon their said bonds, as they were bound to do by the terms of said bonds, to the holders thereof, independent of the contract between said corporation and the Pittsburgh and Connellsville Rail Road Company.

"Offer overruled *per curiam.*

Offer No. 7.

"The Defendants now offer to give in evidence the annual reports of the plaintiff prior to 1856, together with the annual accounts of their Treasurer, showing the same period, for the purpose of showing the state and condition of the plaintiff's affairs prior to the Act of 11 April, 1856, and enabling the jury to judge whether, since that time, the said plaintiffs have been guilty of

any misuse or abuse of their privileges, according to their actual ability, or according to their duty.

"The plaintiffs object to the foregoing offer—

"1st. Because there is nothing, in the reports of the said Company prior to the report of 1856, stated in the repealing Act of 1864, as grounds for the repeal of the charter of said Company.

"2d. Because the said reports contain nothing from which the jury could be legally permitted to find said Company were guilty of any misuse or abuse of its privileges, within the meaning of these terms, in the charter of said Company prior to the 11th day of April, 1856.

"3d. Because the offer is made to show facts occurring prior to the date of the condoning Act of 1856, and is in disregard of the previous rulings of the Court.

"Offer overruled *per curiam*.

Offer No. 8.

"The Defendants now offer the annual report of the Treasurer's report for the year 1855, for the same purpose as stated in the offer No. 7.

"Plaintiffs object for the same reasons as those stated to the previous offers.

"Offer overruled *per curiam*.

Offer No. 9.

"The Defendants, further to maintain the issue on their part, now renew their several offers heretofore made, and show acts of malfeasance and misfeasance, such as amount to a misuse and abuse of corporate power and right, prior to the so-called condoning Act of 1856, and this renewed offer now made in view of and in consequence of the additional proofs received since said offer was made, and especially in view of the admission of the bill and answer and replication in evidence.

"The Plaintiffs object to the foregoing offer—

"1st. Because the question as to the operation of the Act of 11th April, 1856, in this connection, which it raises, has already been more than twice properly decided by the Court.

"2d. Because the said condoning Act is not construed independently of any evidence in *pais*, or of anything in the bill, answer and replication.

"3d. Because the said condoning act curing all alleged acts of misuse and abuse prior to 11th April, 1856, the only question under the issue now to be tried is, whether the Company misused or abused its charter, within the meaning of the 20th section of the same, since the date of the passage of said condoning Act, and no evidence of any kind not bearing upon that issue is admissible.

"Offer overruled *per curiam*.

Sixteen Points by Defendants.

Question to be determined by the jury is—

"1. Whether the Pittsburgh and Connellsville Rail Road Company was at any time prior to the 29th April, 1864, guilty of abusing or misusing its franchises and privileges.

"2. This question must be decided in the affirmative and the verdict must be in favor of the Defendants, if the jury believe that the Pittsburg and Connellsville Rail Road Company has at any time previous to the date above mentioned wilfully done any acts which is a violation of its charter or the general law of the State and injurious to the public interest.

"3. The Act of Assembly of 29th April, 1856, repealing the charter of the Pittsburgh and Connellsville Rail Road Company is of itself evidence that the Company had prior to that time abused or misused its charter, and the jury has no right to presume that the Legislature passed that Act without constitutional authority to do so.

"4. Therefore unless the Pittsburgh and Connellsville Rail Road Company has proved by affirmative and clear evidence that they did not misuse or abuse its privileges, the verdict must be for the Defendants.

"5. If the Company was incorporated to make a road to a certain place designated by the law and used the power given to it and the money obtained under its charter for the purpose of making another road at a different place, or on a route not expressly and plainly authorized by its charter, it is guilty of misuse and abuse.

"6. If the Company with a charter which authorized it to make a road to Smithfield, or any place within the State on the waters of the Youghiogheny, undertook and agreed to expend its means and exercise its powers for the purpose of making a road to Cumberland on the waters of the Potomac and in the State of Maryland, it was guilty of a gross and impudent fraud, and this is a clear case of abuse and misuse.

"7. The power given by the Act of the 18th April, 1853, to extend the road to any point in Bedford and Fulton Counties to connect with the Franklin and Allegheny Rail Road, or any other road that may be made, does not justify or excuse the conduct of the Company in making or agreeing or attempting to make a road to Cumberland.

"8. The expenditure of $220,000 at the Sand Patch tunnel on the route to Cumberland; the survey of that route through the State of Maryland to Cumberland; the agreement with the City of Baltimore to make the road to Cumberland; the acceptance of the Maryland law which required it to be done; all these acts are fraudulent and illegal, and such an abuse and misuse of the charter as justified fully the Repealing Act of 1864.

"9. The failure since 1864 as well as previously of the Company to pay interest on the bonds of Allegheny County and Pittsburgh, as by contract it was bound to do, was not only a fraud upon the said city and county, but an abuse of the charter aggravated by the subsequent sale of the stock for which the bonds were given and the purchase of them by the President of the Pittsburgh and Connellsville Rail Road Company for the use of the Baltimore and Ohio Rail Road Company, a foreign corporation, at an enormous sacrifice.

"10. That the Pittsburgh and Connellsville Rail Road Company have no authority of law for crossing the boundary which separates Pennsylvania from Maryland, or for connecting with a road in the State of Maryland, and that such an intention upon the part of said company, evidenced by positive acts, such as the expenditure of money and the formation of contracts for the construction of a road which, if built, would cross the boundary of the State, constitute a misuse and abuse of their corporate rights.

"11. That a delay of nineteen years in completing the road they were authorized to build, even if condoned by the Act of 1856, if followed by a still further delay of eight years, at the expiration of which large parts of the work remained unfinished and not even under contract, constitutes of itself a misuse and abuse of their corporate rights.

"12. That the expenditure of large amounts of money at the Sand Patch tunnel, and at other points not on the line of the road authorized by law to be built, constitutes a misuse and abuse of their charter.

"13. That the failure to provide a capital stock by individual subscription, or to make an effort so to do, and the dependence upon corporate and municipal subscription, constitutes a misuse and abuse of their charter.

"14. That the Act of 1856 does only condone acts of omission or negligence, not those of designed and wilful wrong or perversion of duty or of positive misfeasance, and that such acts, if proven, although occurring prior to 1856, are to be considered by the jury, and constitute a misuse and abuse of corporate power.

"15. That a rail road company cannot cross the boundary line of the State or unite with a rail road in another state without express authority of law to do so, or without authority derived by an irresistible implication from the language of its charter.

"16. That a power to cross the boundary or unite with a rail road in another State cannot be inferred from the 7th section of the Act of April 18, 1843, because there the limitation is express to an extension "within this Commonwealth;" nor can it be inferred from the 6th section of the Act of April 18th, 1843, because the limitation as to any point they may select in Somerset or Bedford Counties.

"In the usually emphatic language of my brother Grier, I refuse to answer this catechism.

"*Per curiam.*"

(See Record, pp. 48—55.)

Before they retired Judge McCandless instructed the jury as follows:

"I regret very much that in the trial of this issue I have not had the assistance of my brother, Mr. Justice Grier, whose severe indisposition has prevented him from taking his seat on the bench at this term. His high judicial reputation, co-extensive with the Union, would have given a great moral effect to the instructions which it is the duty of the Court to utter for your guidance. That is not expected in what may be said by me.

"This is an issue out of chancery to inform the conscience of the Chancellor as to a question of fact which cannot be reviewed elsewhere, and I have only to instruct you as to what constitutes "misuse and abuse" of the franchises of a corporation. Your verdict, for either party, in making his decree, the Chancellor may disregard altogether.

"You will have perceived, during this protracted and interesting investigation, that the Legislature of Pennsylvania, by an Act passed the 28th of April, 1864, and which, the Governor of the State refusing to sign under a provision of the Constitution, became a law on the 19th of August of the same year, repealed

the charter of the Pittsburgh and Connellsville Rail Road Company. That law this Court declared to be unconstitutional, being a 'law impairing the obligation of a contract' which the State of Pennsylvania made with a corporation, and which is in violation of the Constitution of the United States.

"As there was a writ of *quo warranto*, at the instance of the Attorney General of the State, pending in the Supreme Court, we deemed it due to the parties litigating, as well as a proper courtesy to that high court, that an opportunity should be afforded to the law officer of the Commonwealth to enquire, in that tribunal, whether the Pittsburgh and Connellsville Rail Road Company had 'misused or abused' its corporate franchises. Ample time was allowed for that purpose, and no further proceedings having been taken by the Attorney General, this Court directed an issue to try the question of fact.

"You have listened for many days to the testimony on both sides, given by respectable and intelligent witnesses, and to able and distinguished counsel, who have exerted their great powers to illustrate the details in evidence, and it now becomes the duty of the Court briefly to explain the principles of law applicable to the case. Upon your verdict may depend what our final decree will be.

"In this examination we have limited the enquiry to acts of omission and commission on the part of the corporation subsequent to the date of the condoning Act of the State of Pennsylvania of the 11th of April, 1856, upon the faith of which the City of Baltimore loaned her credit, and paid one million of dollars. Any offence against the sovereignty of the State of Pennsylvania she pardoned by the act of her Legislature of that date. You will therefore ascertain from the testimony, and inform us by your verdict, whether the Pittsburgh and Connellsville Rail Road Company, since the year 1856, has 'misused and abused' the franchise granted to it by the State of Pennsylvania.

"There can be no 'abuse or misuse' without a positive act of malfeasance. This, to furnish ground of forfeiture, must be wilful. It must be something more than accidental negligence, excess of power, or mistake in the mode of exercising an acknowledged power.

"There is nothing profound or mystical about these words 'misuse or abuse.' They are not terms of art in the law. The popular sense in which they are used every day is well known. To abuse is composed of *ab* and *utor;* and in strictness it signifies to injure, diminish in value, or wear away by using improperly.

"Misuse is a still simpler word. It signifies merely to use amiss. But I admit that these words, like all others, may have different meanings when spoken with reference to different subjects. Acts which would be an abuse of one thing may be no abuse of another. We are therefore to ascertain precisely what is 'abuse or misuse' of the corporate privileges by the Company. Abuse includes misuse. We take them both together and define them thus: Any positive act in violation of the charter, and in derogation of public right, wilfully done, or caused to be done, by those appointed to manage the general concerns of the corporation.

"Such is the definition of 'misuse or abuse' adopted by this Court, and you will apply it to the facts given in evidence, accordingly.

"As to the sixteen points submitted by the learned and able counsel for the Respondents, as well as the two by those of the Complainants, I dismiss them; and in the usually emphatic language of my brother Grier, I decline to answer such a catechism, except as to the sixteenth point made by Respondents, and the two points made by Complainants' counsel.

"I answer, distinctly, that under the Act of the 18th of April, 1853, the Pittsburgh and Connellsville Rail Road Company have the right to make their road to the Maryland line, and to connect there with any road authorized by the State of Maryland.

"The case now on trial is one of great national importance. It was not the design of the wise framers of the Constitution, nor is it now the policy of the government and people of the United States, that any Commonwealth shall be permitted to place restrictions upon commerce between the States of the Union. Our territory is so vast in extent, embracing such a variety of soil, climate, and mineral wealth, and, with a restored and unbroken nationality so capable of future and further extension and development, that both for military and commercial purposes, the mere imaginary boundary lines of States are not to be considered upon the map of the Union. It seems so much like the European system of 'viseing' passports at the dividing line of every petty monarchical principality.

"The propriety and necessity of this very road has been recently agitated in Congress, and a bill looking to its early construction has passed its popular branch. It crosses Mason and Dixon's line. In the midst of many States it will be an iron band of public utility, contributing largely to the unity and perpetuity of the United States. It should be made; placing as it

will the fertile fields of the great West and the lakes in direct communication with tide-water and the seat of the general government.

"WILSON McCANDLESS,
"*U. S. District Judge, sitting at Circuit.*"

The verdict having been rendered and certified to the Court in Equity, the following final decree was rendered. (See Record, pp. 58, 59.)

Final Decree.

And now, to wit, June 28th, A. D. 1866, this cause came on to be heard and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed, as follows, viz: That the Act of the General Assembly of Pennsylvania of the 19th of August, A. D. 1864, entitled 'An Act relative to the Pittsburgh and Connellsville Rail Road Company,' and such portions of the Act of the General Assembly of the State of Pennsylvania, of the 19th of August, A. D. 1864, entitled "An Act to incorporate the Connellsville and Southern Pennsylvania Railway Company,' as confer upon the said Connellsville and Southern Railway Company any of the rights and franchises of the said the Pittsburgh and Connellsville Rail Road Company are, and are hereby adjudged to be, unconstitutional, null and void, and of no force or effect: that the said the Connellsville and Southern Pennsylvania Railway Company, their agents and servants be, and hereby are, perpetually enjoined and commanded from henceforth, altogether to absolutely desist from taking possession of or in anywise interfering with the route and road, and rights and franchises of the said the Pittsburgh and Connellsville Rail Road Company, and from pretending or asserting any right or title thereto, and from instituting any action at law or proceeding in equity for the recovery of the possession of the route and road of the said the Pittsburgh and Connellsville Rail Road Company, or any part thereof. And it is further ordered and decreed, that the said the Pittsburgh and Connellsville Rail Road Company be, and the said Company are, hereby perpetually enjoined and commanded, that the said Company do not in anywise accept, ratify, or recognize as binding the Act of Assembly entitled "An Act relative to the Pittsburgh and Connellsville Rail Road Company:" And it is further ordered that the said the Connellsville and Southern Pennsylvania Railway Company do pay unto the said Com-

plainants their costs of suit, the same to be taxed by the Clerk on five days notice to the solicitors of the said the Connellsville and Southern Pennsylvania Railway Company.

WILSON McCANDLESS,
"U. S. District Judge, sitting at Circuit."

From this decree the Respondents severally appealed. (See Record, pp. 59, 174.)

Of the nine offers of testimony made by the Respondents, and their sixteen points, this much may be said.

They had reference to a proceeding ordered by the Court with a view to inform the conscience of the Chancellor on those points on which he entertained a doubt, and it was for him to say, and for him alone to say, on what points he desired the aid of a jury. It was not for the parties, or either of them to insist that such and such instructions should be given to the jury; for that would have been to transfer to the latter the control of the case, whereas after the jury had rendered their verdict it still rested with the Court to be governed by it or to reject it. To place the appeal, then, upon grounds such as would be assumed were this Court to be asked to reverse the final decree merely because of a misdirection to the jury, would be to place it on grounds clearly untenable.

But, even, were this not so, the rulings, tested by the strictest standard, will bear the closest examination.

The Court had decided, and decided properly, that there could be no misuse or abuse without a positive act of malfeasance, which, to furnish ground of forfeiture must be wilful—and it had defined these words "misuse and abuse" to mean positive acts in violation of the charter, and in derogation of public right, wilfully done or caused to be done by those appointed to manage the general affairs of the Corporation.

It had also decided, that, whatever abuse or misuse the Pittsburgh and Connellsville Rail Road Company might have committed after the date of the Condoning Act of 11th April, 1856, yet that prior to such date, such acts, even admitting they could be proved, were not matters of offence in this connection.

And it will be seen on the examination of the "offers" and "points" of the Respondents, that they are, nearly all, either embraced by these decisions, or that they come within the scope of

the objections suggested when the offers were made—such as that it did not lie in the mouth of the Respondents to find reasons for charging misuse or abuse, which the Legislature in its justificatory preamble to the repealing Statute of 1864, had not thought worthy of mention, and had passed by in silence—and again, that wrongs alleged to be done to third parties such as the cities of Pittsburgh and the County of Allegheny, which third parties made no complaint of, could not be availed of to bring the case of the Company within the 20th section of the Charter.

There are matters no doubt suggested by the "offers" and "points" referred to, which go to the gist of the present controversy, and these it will be found are fully covered in the present brief of argument.

The broad and leading question presented by the record is the constitutionality of the Act of the Legislature of Pennsylvania, repealing the Charter of the Pittsburgh and Connellsville Rail Road Company, on the ground of an alleged abuse or misuse of corporate powers.

This Act was preceded by no judicial investigation or legislative enquiry. The facts relied on by the Legislature in its justificatory preamble are assumed by it to be true. A party to the contract, it constitutes itself a Judge, who decides without testimony, and, of its mere will, vacates its own most solemn obligations.

"A corporation may be dissolved by a forfeiture of its charter, through abuse or neglect of its franchises, as for a condition broken. But such forfeiture must be judicially ascertained and declared upon direct proceedings against the corporation for that purpose, in order that it might not be condemned unheard for an imputed delinquency."

Canal *vs.* Rail Road, 4 Gill and Johnson R. 1—122, citing Rex *vs.* Avery, 2 T. R. 515. Same *vs.* Passmore, 3 T. R. 199. Terrett *vs.* Taylor, 9 Cr. 43. College *vs.* Woodward, 4 Wheat. 518. Slee *vs.* Bloom, 5 Johns. C. R. 366. Same *vs.* Same, 19 Johnson, 456. Trustees *vs.* Hill, 6 Cowan, 23.

But the corporators may deprive themselves of the protection thus given by the principles of law and the Constitution by submitting themselves, in the first instance, absolutely to the will of the Legislature—making the Legislature their judge.

This was the case in *Crease* vs. *Babcock*, 23 *Pick.* 234, and *McLarren* vs. *Pennington*, 1 *Paige*, 107, where the right to repeal was "at the pleasure of the Legislature." The case of De Camp *vs.* Evelen, 19 Barbour, 81, which has been referred to sometimes as vindicating the power of the Legislature, was that of a *municipal* corporation, involving no question of contract. The case of the Miners' Bank *vs.* The United States, in 1 Green, (Iowa,) 561, which would make the legislative action conclusive of the right to annul a charter, is regarded as of no authority.

Does the charter, then, of the Pittsburgh and Connellsville Rail Road Company bring it within the category of such cases as Crease *vs.* Babcock, and McLarren *vs.* Pennington?

The 20th section provides, "that *if the Company shall at any time misuse or abuse any of the privileges therein granted*, the Legislature may resume all and singular the rights and privileges thereby granted to the corporation."

Here, at once, is a broad distinction between the cases.

The right to repeal is not at the pleasure of the Legislature. It depends upon the fact of "*misuse or abuse.*"

This case, therefore, does not fall within the category to which *Crease* vs. *Babcock* belongs.

Both parties to the contract are equally interested in the fact upon which the right of the Legislature to repeal is made to depend.

Why should one party rather than the other have the right to determine it?

There is nothing *in the contract* which, in so many words, gives it to either.

The language is not, if, *in the judgment of the Legislature*, the said Company shall, at any time, misuse or abuse, &c. &c." or words to that effect.

The language used leaves the fact to be determined as are all other questions arising under contracts, by the Judiciary—a department of the Government kept by the Constitution distinct from the Legislative department—and, when the latter assumes the functions of the former, it is in clear violation of the instrument that creates them both.

In the leading case of Rex *vs.* Passmore, 3 T. R. 144—it is said (p. 245:) "a *scire facias* is proper when there is a legal existing

body capable of acting, but who have been guilty of an abuse of the power entrusted to them: *for as a delinquency is imputed to them*, they ought not to be condemned unheard."

In this case there was no question as to the right of repeal reserved in a charter for misuse or abuse; but the reasoning is equally applicable to all cases where a delinquency is imputed.

The English case, which comes nearest to the present is the case of *The Eastern Archipelago Company* vs. *Regina*, 22 *English Law and Equity Reports*, 328—where a charter was granted by the Crown on certain conditions,—and in which it was provided, that if the corporation "*shall not comply with any of the directions and conditions* in our said letters patent contained, it shall be lawful for us, our heirs and successors, to revoke and make void our royal charter, and every clause, matter and thing therein contained, either absolutely or under such terms and conditions as we or they shall see fit."

Here, as in the case of The Erie and North-East Rail Road Company *vs.* Casey, in 26 Penn., the breach of the conditions by *positive* acts was conceded. "All that we know *upon this record is* that the condition has been broken, and the legal consequences of a breach of condition must follow," says Cresswell, J. 348.

At page 343, it is said, (Williams, J.)—"The proviso, I concede, is so worded that the revocation by writing under the Great Seal or Sign Manual of the Queen, would be ineffectual *per se*, notwithstanding the writing affirmed that the corporation had failed to comply with the conditions, and explicitly stated in what the non-compliance consisted." [Just what in this case the preamble of the Repealing Act affirms and states.] "It would, I admit, be necessary in order to make the revocation by the Crown operative, to prove the truth of the matters so affirmed and alleged."

Parke, J. dissented in this case, but upon the point now under consideration, agreed with his associates. "The option of the Crown," he says, "to repeal the charter by writing under the Great Seal or Sign Manual, would not operate at all, unless there had been a breach in fact, and whether there had been, a jury would still have to determine. In any proceeding by the Company against a subject, he could not defeat the charter by simply producing the writing or sign manual he would still have to prove that there had been a breach of the conditions of the charter."—p. 352.

Jervis, C. J. goes so far as to say—"I doubt whether under any circumstances a charter under the Great Seal can be revoked

by writing under the Sign Manual, and I see many constitutional reasons which might be urged against the existence of such a power uncontrolled in the Crown."

Again—"Certainly an unlearned reader would suppose where the grantor and grantee made a bargain that the former might revoke a charter by writing, under the Great Seal or Sign Manual, for the breach of any of the conditions mentioned therein—that the mere exercise of the right would destroy the charter.

"But this is not the legal effect of the proviso; the power can only be exercised for the breach of any of the conditions; and no mode of ascertaining, in the first instance, whether such breach has been committed is provided by the charter or exists at Common Law. If the Crown were in the most solemn form, under the Great Seal, to declare that the provisions had been broken, and to revoke the charter upon that ground, this would be but the commencement of legal proceedings—for the Company might deny the breach of the conditions, and a *scire facias* would be necessary before the charter could be cancelled."—p. 358.

In the opinion delivered by Talfourd, J. he takes occasion to express his concurrence in the opinion, in this connection, of the Ch. Justice of the C. P.

No other cases have been found in the books than those here referred to—at all corresponding with the case under discussion.

All have been commented on—and the weight of authority establishes, that the fact of misuse or abuse not having been judicially determined beforehand, the Act of 1864, which repeals in part the charter of the Pittsburgh and Connellsville Rail Road Company, is wholly inoperative.

See 12 Conn. 7. 5 Mass. 230. 2 Burr, 869. 9 Wendell, 352. 6 Cowan, 23. 15 Johnson R. 379.

It is contended, therefore, that the Repealing Act of Pennsylvania is unconstitutional.

1. Because it is in violation of general principles of law, established by authority and applicable in like cases.
2. Because it is in derogation of the Constitution of the United States and the Constitution of the State of Pennsylvania.
3. Because, in passing it, the Legislature assumed functions, which belonged exclusively to another branch of the Government.

If this view of the case is correct, there is no necessity for further argument—and it is this view which the Appellees emphatically insist upon. It was the view taken by the Court at the trial at Williamsport in 1865, on the argument of the demurrer, by which the facts of the Bill, as since proven, were admitted.

The Bill in this case puts its claim for relief on two grounds however.

It insists that the repealing Act of 1864, was unconstitutional: but it insists also, as an alternative proposition, that if it was not unconstitutional *per se*, its constitutionality was *prima facie* only.

In other words, the judgment of the Legislature that there has been such a misuse or abuse as justifies the repeal of the charter is not conclusive—but the fact may be enquired into at the instance of the corporation or any other interested party.

This it is contended, has been conclusively established by the case, already mentioned, of *The Erie and North-East Rail Road Company* vs. *Casey*, 26*th Penna.* 319.

In this case, the charter of the Rail Road Company contained the following clause:

"If the Company misuse or abuse any of the privileges hereby granted, the Legislature may resume the rights granted to the said Company"—which is substantially the language of the 20th section of the charter of the Pittsburgh and Connellsville Rail Road Company.

It is to be remarked, however, that the charters of the two Companies are essentially different in important particulars.

The charter of the Erie and North-East Rail Road Company, gave the Company ten years from 1842 in which to finish their work. It required them to complete it to a given point—and prohibited interference with certain streets and roads. The charter of the Pittsburgh and Connellsville Rail Road contained no such restrictions or conditions.

The Court, in the Pennsylvania case, *actually went into a judicial investigation of the alleged misuse or abuse.*

At page 314 of the report, it is seen that Examiners were appointed "*to take testimony in the cause,*"—who returned that the road had not been constructed to the point designated in the charter—and that it materially interfered with certain streets and roads,—both of which facts were, undoubtedly, the *positive acts*

that suggested to Judge Black the definition that he gave of "misuse and abuse."

That the work had not been completed in the time limited in the Charter, was a *concessum* in the case.

Not only this, but the Court placed its decision on the facts found by the Examiners.

"We are satisfied." says Judge Black, who delivered the opinion of the Court, "that in point of fact, the franchises were abused and misused." 26 *Penn. R.* 309.

"This Company," said Judge Lowry, one of the majority, "could never have been led into this difficulty, if it had not colluded in the impudent fraud of the Franklin Canal Company."

Referring to the conduct of the Company evidently, Judge Knox, the third concurring Judge, said of the Repealing Act, "its terms are as favorable to the Company as it had any right to expect."

While it was no where stated, in the Court's "recapitulation of the main points in the case," at page 309, that the legislative power of repeal was absolutely independent of any judicial investigation, in a case like that before it—yet it might possibly be inferred that Judge Black held this doctrine from his references, at page 302, *to Crease* vs. *Babcock*, 23 *Pick.* 234, *McLarren* vs. *Pennington*, 1 *Paige*, 107, 19 *Barbour*, 81, and the *Miners Bank* vs. *The United States*, 2 *Green*, (*Iowa*,) 561.

With the exception of the last case, which may be regarded as of no authority under the circumstances attending it—the authorities referred to, fail to support any such doctrine—inasmuch as, in *Crease* vs. *Babcock*—and *McLarren and Pennington*,—the right of repeal was "*at the pleasure of the Legislature*," and *in* 19 *Barbour*, 81, *De Camp* vs. *Evelin*, the case was that of a Municipal Corporation, involving no question of *contract*, such as arises here.

In the Rail Road Company *vs.* Casey, 26 Penn. 315, Judge Black said, "For the Defendant it is insisted, that the Repealing Act is itself not only evidence, but conclusive evidence, that the Company had previously committed some abuse or misuse that justified the repeal. *No case has been cited*, which denies this doctrine in terms, and it was held true by the Supreme Courts of Iowa and New York. (1 Greene, 19 Barb.) But *I do not see clearly the principle on which it can stand.*" "For myself, I incline to the opinion that, when the constitutional power of the Legislature depends on matter of fact, the party to be affected by

it ought to have an opportunity afterwards of shewing how the fact is."

Commenting on 1st Greene, *the Court* say—"It was held that not only the fact on which the right of repeal depended, might be noticed by the Legislature without the assistance of the Judiciary, but that its truth could never afterwards be questioned by any Court. *Without intending to endorse the whole of the doctrine of the last mentioned case*, we are very clear that the right of appear rests in and may be exercised by the Legislature *whenever the event occurs* upon which they stipulated for the right. *The most that can be said is that the repeal is void if it comes before the event* [which would not be if it proved the event!] *If the corporators desire to test the validity of the Repealing Act in a Court, they must, at least, prove that the event did not occur.*"

The Court then proceeded, "This view of the subject makes it important that *we* should see, whether the privileges of this Company were misused or abused. Did the corporation violate the charter? We are obliged, *as the case now stands*, to answer this question in the affirmative."

"In the *first* place we are bound to take an Act of Assembly to be constitutional until the contrary is shown. *In the absence of evidence,* we presume the existence of every fact on which the validity of the law depends. *Secondly*, the Plaintiffs' Bill does not aver that they performed their duties according to the charter; and this they certainly would have averred if they could safely have done so. *Thirdly*, a record of this Court is referred to in the Bill, and produced in evidence, from which it appears that a decree was pronounced against them for fixing their terminus at a place not authorized, and for locating their road on streets and highways in a manner expressly forbidden."

It is unnecessary to quote more from this opinion of the whole Court in Pennsylvania, not only to sustain the alternative proposition of the Bill in the present cause, but to vindicate the particularity and detail of every one of its averments.

It had already been shewn by reference to the case of The Eastern Archipelago *vs.* Regina, 22 Eng. L & E. that the repeal of a Charter by writing under the Great Seal or by Sign Manual for breach of conditions, under a reserved right to that effect, did not preclude enquiry into the fact on which the right had been made to depend.

There is, therefore, a leading decision in England as well as one in the United States, upon charters on all fours with each other, to support the position now under consideration.

Under the decision in 22 English Law and Equity, it would be for the Crown, or parties interested, to prove, in the *scire facias*, that the event on which the validity of the repeal of the charter depended, had occurred. *Under the decision in* 26 *Pennsylvania, it would be for the Corporators, or others having a right of action, to prove that it had not occurred.* The burthen of proof would be different,—that would be all.

The case in 26th Pennsylvania has been thus commented on in detail, because it is understood to have been relied on to justify the act of arbitrary power, on the part of the Legislature, in repealing, of its own motion, the charter of the Pittsburgh and Connellsville Rail Road Company; and because, when analyzed, it becomes on the contrary, an authority to support the alternative claim for relief of the Bill—which assuming *argumente gratia*, that the Repealing Act is not absolutely void, insists on the right of the Rail Road Company to avoid its operation by taking upon itself the burden of proof, and satisfying the proper tribunal that, in point of fact, no misuse or abuse existed when the Repealing Act was passed.

As already said, more than once, however, the Appellees contend that the Act was absolutely void.

The only sound view of the law taken in 26th Pennsylvania, is that which is to be found in the opinions delivered by the dissenting Judges, and which is referred to by Judge Grier in the opinion delivered by him on the first hearing of the case at Williamsport, in 1865.

"A private corporation," says Judge Lewis, dissenting, "when accepted and capital expended on the faith of it, is a contract too well settled to be denied." That a charter for the construction of a rail road is a private corporation, is equally well settled. That the obligation of a contract cannot be impaired by a State, is a principle to be found in the Constitution of the United States, and of the State of Pennsylvania. It follows that a charter to a Rail Road Company thus accepted and acted upon cannot be annulled against the consent and without the default of the corporation, judicially ascertained and declared, unless the power be reserved in the grant.

4 Wheaton, 578. 6 Cranch, 88. 7 Id. 164. 9 Id. 43. 5 W. and S. 101. 6 Barr, 86, 379. 7 Harris, 151. 7 Pick. 344.

Referring then to the reservation of the right to repeal, which was in the case before him identical with the 20th section of the charter now before the Court, and the Judge says, "The reservation is upon condition. But who is to judge whether the contingency on which it depends, has or has not occurred. There is not the slightest intimation that the question of misuse or abuse is to be determined by the Legislature."

And in stating the conclusions to which in the particular case he arrived, Judge Lewis says:

"That the reservation of the power to annul the charter by the Legislature is upon the condition of misuse or abuse, and the Legislature possesses no judicial power under the Constitution, and have none reserved in the grant, and are therefore not authorized to adjudicate upon the misuse or abuse."

Strenuously however, as counsel for the Appellees may contend that the Repealing Act of the Legislature of Pennsylvania is void, the Supreme Court may hold it to be otherwise, and taking the law as decided in the case in 26th Pennsylvania, hold, that it is *prima facie* valid, and that it is for the Complainant below, the Appellees here, to shew that there has been neither "misuse" or "abuse" under the 20th section of the charter.

The question being whether the Act of the Legislature was justifiable, and a justification being attempted in the preamble, we go to that, naturally, to find out the grounds on which the Legislature, itself, placed its action.

The reasons for repeal are stated in the seventh clause of the preamble of the Act of 1864, where it is said that "in the opinion of the Legislature, said Corporation, by the *delay* referred to, and by the *embarrassments, financial and otherwise*, in which said Corporation have become involved, has misused and abused the powers by the said Act conferred."

Now, in the first place, "delay," if not wilful—if due to uncontrollable circumstances,—is, according to the definition of the Court in 26th Pennsylvania, neither misuse nor abuse,—neither, according to the same authority are embarrassments, financial and otherwise, acts of misuse or abuse, if they involve no wilful default.

The charges of the preamble are vague in the extreme. A pretext was wanting. It is the story of the wolf and the lamb drinking at the same stream, over again.

But, in addition to the reasons for repeal declared by the Legislature of Pennsylvania, there are others insisted on in the "offers" and "points" presented by the respondents in the Court below.

So far as relates to the offers of evidence, nine in number, which the Court refused to permit to be given to the jury—they have already been disposed of in this brief, and will not be again referred to.

The sixteen "points" suggest matters which were argued very fully in the Court below, and to which attention will no doubt be called at the hearing before the Supreme Court. They contain the views of the Defendants (below) as to what constitutes "misuse" or "abuse."

Thus, the first point puts the question to the jury, whether the Pittsburgh and Connellsville Rail Road Company was *at any time* prior to the date of the Repealing Act guilty of abusing or misusing its franchises and privileges.

The vice of this point is, that it ignores the Condoning Act of 1856.

The second point requires the jury to find for the Defendants, if at any time prior to the Repealing Act the Company had wilfully done any acts which were a violation of its charter or the general law of the State, and injurious to the public interest.

This point has the same defect as the last, ignoring the Condoning Act of 1856—besides which, it leaves questions of law as well as of fact to the jury, and alleges as causes of repeal other causes than those set forth by the State itself in its preamble to the law of 1864.

The third point makes the passage of the Repealing Act evidence of the power of the Legislature to act judicially and determine the fact of "misuse" or "abuse."

Why, this is the very question under consideration, and in reply to it, reference is made to the argument already offered.

The fourth point puts the burden of proving the negative as to "misuse" or "abuse" on the Plaintiff.

This, in the alternative view that the Statute was *prima facie* constitutional, the Plaintiffs had assumed successfully as shown by the verdict.

The fifth point is, that if the Company incorporated to make one road, made another, not expressly and plainly authorized by the charter, it was guilty of misuse or abuse.

This might have been admitted—it involved, however, the construction of the charter, it being for the Court to say what was authorized and what was not.

The sixth point puts a hypothetical case in strong, if not in coarse, terms—and is the same as the last, except that it names as an unauthorized road the road to Cumberland.

The seventh point refers to the Act of 18th April, 1853, authorizing the road to be extended to any point in Bedford and Fulton Counties to connect with the Franklin and Allegheny Rail Road *or any other road*, and insists that it does not authorize the agreement of the Company to make a road to Cumberland.

The eighth point refers to the expenditure of money at the Sand Patch Tunnel east of Connellsville, and the surveys of a route to Cumberland as fraudulent and illegal.

The tenth point (omitting the ninth for the present) denies the authority of the Pittsburgh and Connellsville Rail Road Company to cross the boundary between Pennsylvania and Maryland, and alleges that doing so would be an act of misuse or abuse.

The twelfth point (omitting the eleventh for the present) alleges that the expenditure of money at the Sand Patch Tunnel was unauthorized, and was an act of misuse or abuse. This point is a repetition of the eighth.

The fifteenth point is a repetition substantially of the tenth, and so is the sixteenth.

The fifth, sixth, seventh, eighth, tenth, twelfth, fifteenth and sixteenth are all directed to the power of the Company under its charter to unite with the Pittsburgh and Connellsville Rail Road Company of Maryland. (See Record, p. 108.)

Upon this point the Court told the jury: "That under the Act of April, 1853, the Pittsburgh and Connellsville Rail Road Company had the right to make their road to the Maryland line and to connect there with any road authorized by the State of Maryland."

This was in answer to the tenth point—and it is deemed proper presently to show that the Judge was right in the instruction.

The ninth point alleged as ground of misuse or abuse, was the failure of the Company to pay an interest on its bonds and the subsequent purchase of the stock in payment for which they were given by the Baltimore and Ohio Rail Road Company.

This "point" is open to several objections. In the first place, this is not one of the reasons alleged by the Legislature for the Repealing Act. In the next place, the party complaining is not the State, neither is it the City of Pittsburgh—and again admitting the facts even, there would be few rail road charters in the country safe if this test was to be applied to them. It is true that the preamble of the Repealing Act refers to financial embarrassments, but this is general, and in the absence of any complaint on the part of the City or County, it is difficult to see how the failure to pay interest can be construed into either misuse or abuse.

The eleventh point dwells on the delay of nineteen years up to the date of the Condoning Act in completing the road as proof of misuse or abuse and the delay of eight years afterwards.

The fact is incorrectly stated, for the first delay was from 1843 only, when the letters patent were issued, and not from 1837—and the Condoning Act excuses it—and the subsequent delay, under a charter which, it must be borne in mind, has no limit within which the road authorized must be completed, is accounted for by the evidence which fully sustains the allegations of the Bill in this regard.

The thirteenth point is a singular one. It charges the failure of the Company to provide subscriptions as an act of misuse or abuse!

And the fourteenth point insists that the Condoning Act does not cover neglect in completing the road.

The answer is easy. The Act speaks for itself.

Simplified as far as practicable, the various matters suggested by the Respondents, the Appellants here, may be disposed of in the alternative view of the Repealing Act, which we are now taking, by the answers to be given to two enquiries.

1. What were the powers of the Pittsburgh and Connellsville Rail Road Company looking to the construction of a railway

from the city of Pittsburgh to the Pennsylvania line, there to connect with a road to Cumberland.

2. Were these powers misused or abused under the 20th section of the original charter.

1. As to the powers of the Pittsburgh and Connellsville Rail Road Company.

The charter of the Pittsburgh and Connellsville Rail Road Company bears date April 3d, 1837. *See Record p.* 72.

It authorizes the Company "to locate and construct" &c. "a Rail Road," &c. by the course of the Monongahela and Youghiogheny Rivers to some suitable point at or *near* Connellsville, and to join or intersect *at that point, or any other practicable point, any other improvement either by Canal or Rail Road,"*—and requires among other things a map of the route to be filed in the Secretary of State's office.

We see here, that the original charter, while it authorized the construction of a road from Pittsburgh to Connellsville only, and, to that extent was a local road, *contemplated the extension of the work beyond the latter place, either by Canal or Rail Road.*

The Baltimore and Ohio Rail Road charter, granted by Pennsylvania in 1828, required the extension of that road to Pittsburgh.

The Act of 1837, therefore kept alive the idea of the Act of 1828—*the idea of a through line between Pittsburgh and Baltimore.*

The 3d section of the Act of 1837 scaled the votes of the Stockholders, and no stock was taken under it.

In 1843, the limit of the Baltimore and Ohio Rail Road Company's charter was reached. Thereafter, it had no existence in Pennsylvania. The field was then open and unobstructed; and the Act of April 18th, 1843, was passed—*Record p.* 83—reducing the shares of the Pittsburgh and Connellsville Rail Road Company from one hundred to fifty dollars, lessening the amount to be paid at the time of subscribing, authorizing the Counties of Allegheny, Westmoreland, Fayette and Somerset to subscribe—and especially authorizing the Company *"to extend its road beyond Connellsville to Smithfield, or any other point on the waters of the Youghiogheny and within the limits of this Commonwealth."*

This Act was repealed the next day, *Record, p.* 84; but it was revived on the 3d April, 1846, *Record, p.* 84, and has since remained unrepealed. In speaking of it, therefore, no notice need be taken of the repealing Act of April 19th, 1843. On the 10th April, 1846, *Record, p.* 84, the scaled voting was changed to voting by shares. On the 17th of the same month, additional commissioners to obtain subscriptions were appointed, and on the 11th June, the letters patent, reciting a compliance with the terms of incorporation, in regard to the amount of stock required to be subscribed as a condition precedent, were issued in due form, and the Pittsburgh and Connellsville Rail Road Company came into practical existence. *Record p.* 85.

The Act of 1846, April 10th, not only keeps up the idea of the through line, which the circumstances attending the Act of 1837 and the language of that Act suggest, but it indicates a route which might have been adopted.

The Youghiogheny River flows from Maryland into Pennsylvania; so that the grant, even if restricted to the river proper, afforded a route into Maryland, and a connection with the Baltimore and Ohio Rail Road in the glades of Allegany County. *See the map accompanying the record.*

But it is held that "*the waters of the Youghiogheny*" have a more extensive meaning than would have attached to the words "to Smithfield or any other point on *the Youghiogheny River*, and within the limits of this Commonwealth."

The waters of the Youghiogheny include its tributary streams. One of these is Castleman's River, which falls into the Youghiogheny at Turkey Foot, and whose tributary stream, Flaherty Creek, heads in the great water shed of the mountains, opposite to the sources of Wills Creek, which finds its way into the Potomac at Cumberland, on the line of the Baltimore and Ohio Rail Road *See the map.*

Two other tributaries of Castleman's River cross the Maryland line into Pennsylvania, either of which affords, as proved by the Engineers who have been examined, *a through line by the waters of the Youghiogheny.* One of these was actually surveyed for the Montevue Mining Company, which, under a law of Pennsylvania, of 19th April, 1854, proposed to construct a rail road from Meyers' Mill on Castleman's River to the Maryland line, and thence to Piedmont to unite with the Baltimore and Ohio Rail Road, afford-

ing a through line from Pittsburgh to Baltimore in that direction. *See testimony of B. H. Latrobe*, 167, *Record.*

It is thus shown that there were *three* routes open to the waters of the Potomac under the grant of the right to extend the Pittsburgh and Connellsville Rail Road to any point on the waters of the Youghiogheny; and that, so far from the State of Pennsylvania prohibiting such a through line, or from its policy being opposed to it, as has since been contended, the Legislature, as late as 1854, authorized the construction of such a line in so many words, when it authorized the building of the Montevue Road. *See Record, p.* 102.

But while these routes into Maryland were practicable, the best route, which is a matter of history,—which had been the route proposed for the Chesapeake and Ohio Canal—when that project, before the day of rail roads, was before the public—was by the waters of Flaherty and Wills Creeks, crossing the Sand Patch on the divide between the waters of the Ohio and the Potomac. But this, under the Act of 1846, was not within the reach of the Pittsburgh and Connellsville Company,—the Sand Patch being within the limits of Pennsylvania;—so that Flaherty Creek, one of the waters of the Youghiogheny, afforded no access into Maryland. *See the map.*

To obviate this difficulty, and to open a free choice of routes for a through line, it was necessary to obtain permission to go into Somerset and Bedford Counties, which could only be reached, advantageously and by comparatively low grades, by way of the Sand Patch; and the Legislature of Pennsylvania being applied to, on the 18th April, 1853, gave the required permission, and authorized the Pittsburgh and Connellsville Rail Road Company "to extend their road to any point they may select in Somerset or Bedford Counties, *so as to form a connection with the Chambersburgh and Allegheny Rail Road* OR ANY OTHER RAIL ROAD THAT MAY BE CONSTRUCTED." *See Record, p.* 101.

The result of all this legislation was to open a way for a through line from Pittsburgh to Baltimore as wide for all practical purposes, as it had been, under the charter from Pennsylvania to the Baltimore and Ohio Rail Road Company, which had expired in 1843.

The titles of the Acts of 1843, and 1846 were dwelt on in the Court below. The authority which, on the 18th April, 1843, was given to the Pittsburgh and Connellsville Rail Road Company to extend their road "to any point on the waters of the Youghiogheny, and within the limits of the Commonwealth," is found in the 7th section of an Act entitled "An Act for the relief of the Overseers of the Poor of the Borough of Erie and for other purposes;" and the authority to go into Somerset or Bedford Counties is given, on the 18th April, 1853, by the 6th section of an Act entitled "An Act to incorporate the Safe Harbor and Susquehanna Turnpike Road Company, authorizing the widening of Locust Street in Lancaster City; relative to subscriptions to the stock of the Pittsburgh and Connellsville Rail Road Company"—while the authority to go to the waters of the Youghiogheny, after being revoked the day after it was granted, was restored by the 6th section of an Act entitled "An Act to authorize the Court of Quarter Sessions of Allegheny County to vacate Delaware Lane in said County, and for other purposes;" and the doing away with the scaled vote was accomplished by the 9th section of an Act, passed on the 10th April, 1846, entitled "An Act authorizing the laying out of a State Road from the Borough of Owingsburgh, Schuylkill County, to intersect a public road leading from Easton to Maunch Chunk, and for other purposes."

What effect all this can have is not now perceived. The truth is, that this mode of legislation was as well understood in Pennsylvania as the meeting of the Legislature every winter.

The dates of the legislation in this connection are significant. On the 18th April, 1853, Pennsylvania opened the avenue from Baltimore to Pittsburgh, having in the same Act and the Act of April 12th preceding, made available the powers already given to certain Cities and Counties to subscribe for stock in the Pittsburgh and Connellsville Rail Road Company, by authorizing them to borrow money and provide for the payment of the principal and interest by taxation, while at the same time the Company was authorized to mortgage its road for the purpose of carrying out the purposes of the Act.

On the 8th April, 1853, the Legislature of Maryland, incorporated the Pittsburgh and Connellsville Rail Road Company in that State, *and gave it for the first time the power to make the through line to Cumberland,* where, uniting with the Baltimore

and Ohio Rail Road, then open to Wheeling, it would form a through line from Pittsburgh to Baltimore and Washington.

That these Acts of cotemporaneous legislation were adopted on a *mutual understanding* by the States of Pennsylvania and Maryland, it is simply impossible to doubt: the coincidence is too remarkable to have been accidental. Maryland led the way on the 8th of April: Pennsylvania did what was necessary to make the Act of Maryland effectual on the 12th and 18th; and Baltimore passed her ordinance on the 24th June, 1853, agreeing to endorse the Bonds of the Pittsburgh and Connellsville Rail Road Company.

Thus, on the 11th April, 1856, when the Condoning Act of Pennsylvania was enacted, the Pittsburgh and Connellsville Rail Road Company was authorized by Pennsylvania to construct a Rail Road from Pittsburg to the State line, either on the waters of the Youghiogheny, or in Somerset or Bedford Counties, and it was authorized by Maryland to continue its Road in that State, so as to unite at Cumberland with the Baltimore and Ohio Rail Road.

The 15th of the points of the Appellants, which embraces in effect the 5th, 6th, 7th, 8th, 10th, 12th and 16th is thus answered, by shewing that the Pittsburgh and Connellsville Rail Road Company was authorized to cross the boundary line of Pennsylvania by uniting the road from Pittsburgh to that point with a road in Maryland from thence to Cumberland in express terms—regarding the authority to go to any point on the waters of Youghiogheny, or any point in Somerset or Bedford Counties, to include a point on the State line, as well as all other points, inasmuch as the waters of the Youghiogheny cross the State line and the two counties are in part bounded by it: or, if the express terms meant, in the 15th point, some such phrase as this, "and to unite with a road constructed in Maryland"—even then, in answer to the 15th point, it is insisted, that the right to make the continuous road is "an irresistible implication from the language of the charter"—of which the acts here quoted and relied on form a part.

If there could be any doubt remaining, as to the intention of the Legislature of Pennsylvania in regard to the connection between Pittsburgh and Cumberland by the Pittsburgh and Connellsville Rail Road—it would be remedied by the Legislature of 1857.

The only object of Baltimore in subscribing was, of course, to perfect a connection for her own benefit, and not to promote the interests of a local road in Pennsylvania, or one that was to lead to a rival city. And it was only natural that, when Baltimore issued her own Bonds, she should desire to have the use of them controlled by one in whom she had confidence. *See testimony, p.* 155, *p.* 177, *of Record.*

This led to the selection as President, of Mr. B. H. Latrobe, a citizen of Maryland, about the 1st July, 1856. But the general law of Pennsylvania required that one of her own citizens should hold the office; and to make an exception, in this respect, for the benefit of the City of Baltimore, the Legislature passed the Act of the 22d January, 1857, excepting the Pittsburgh and Connellsville Rail Road Company from the operation of the general law: and this was done when, but two days before, the Company had filed, at Harrisburgh, the map *on which was indicated unmistakably the through line from Connellsville to Cumberland, and none other.* (*See Record, p.* 168.)

That the Legislature of Pennsylvania, with this map so recently filed in the State archives—with an application pending for a change in the general law, to enable the citizen of another State to be the President of a Pennsylvania corporation,—with the knowledge that Baltimore had put her capital into an enterprise in which she could be interested only because of its being part of a through line of which that City was to be a terminus—that the Legislature, with all this before it, intended that the Pittsburgh and Connellsville Rail Road should not become a part of a through line is, indeed, difficult to believe.

Having thus shewn what was the extent of the authority of the Pittsburgh and Connellsville Rail Road Company at the date of the Condoning Act, and fixed the date from which its acts are to be reviewed, to ascertain whether they amounted to misuse or abuse,—the next inquiry is into its conduct after that time, and up to the date of the Repealing Act of 1864, which necessarily paralyzed the work of construction for the time being.

The preliminary enquiry is, of course,—what was its condition at the date of the Repealing Act.

The condition of the Company on the 11th April, 1864, is set forth in the Bill, and is stated in detail in the testimony of B. H.

Latrobe, the President,—pp. 153, 4, 5, and 176, 7, 8, of the Record.

It is shewn by the Record, p. 153, that there was a section of twenty-five miles in operation from Connellsville to West Newton, on which there were two locomotives, two passenger cars and a few freight cars: that another section of twenty-three miles was under contract and in course of construction from West Newton to Turtle Creek, where it was expected to form a junction with the Pennsylvania Rail Road, whose engines were to convey the trains of the Company, whenever it was fortunate enough to have trains, to Pittsburgh; that some sixty odd thousand dollars had been expended at the Sand Patch Tunnel; and that the Company was encumbered with a floating, interest bearing, debt of upward of $700,000—the exact amount on the 1st October 1856, being $788,862. It appears, too, from the testimony, that General Larimer, while holding the office of President, had appropriated to his own use some $220,000.

Starting with this condition of affairs, the Pittsburgh and Connellsville Rail Road Company's first want was money. It certainly had no credit at this time as shewn by the record. Its first step was to apply to the City of Baltimore for the use of its bonds. This was given on the 10th June, 1856, within two months after the date of the condoning act which relieved the city from all apprehension of loss on account of past imputed offences of the Company.

Up to this point, then, 10th August, 1856, there had been neither misuse or abuse, since the Condoning Act was passed two months before.

But what is "misuse or abuse?" There must be a definition agreed upon before we can appreciate the facts.

To constitute either there must be a *positive wilful act.* "Abuse includes misuse. We take them both together and define them thus:—Any positive act, in violation of the Charter, and in derogation of public right, wilfully done, or caused to be done, by those appointed to manage the general concerns of the corporation." (See Erie and N. E. R. R. Co. *vs.* Casey, 26 Penn., 319. "The illegal act must be *positive.*" *Ibid.* Again—"It must be some misconduct which infringes upon a right reserved by the

State for the benefit of the public. It must be wilful: that is, not involuntary, accidental, or the consequence of mere mistake of fact." *Ibid.*

Now, the Legislature, in the Repealing Act, does not confine itself to the naked allegation of a misuse or abuse, but *undertakes, in the preamble, to state in what the supposed misuse or abuse,*—on which the constitutionality of the Act depends,—consists:—thus—

"*And whereas*, In the opinion of the Legislature, said corporation by the *delay* referred to, and by *the embarrassments, financial and otherwise*, in which the said corporation has come to be involved, has misused and abused the powers by the said Act confirmed."

But, unquestionably, "delay" is not a *positive* act, in this case, "wilfully done or caused to be done." Not even the Legislature, in the preamble to the Charter, has undertaken to speak of it as wilful.

So too, "the embarrassments, financial and otherwise, in which," it is alleged, "the corporation has become involved,"—fall short of the definition of "misuse and abuse" to be found in 26 Penna. There is no pretence, in the preamble, that they were the result of misconduct: the testimony clearly shews them to have been involuntary,—assuming them to have existed, at the date of the Repealing Act—when they would amount to neither misuse nor abuse, according to the definition already referred to.

It remains now to be seen whether the Pittsburgh and Connellsville Rail Road Company can clear itself from the definition of misuse or abuse thus given by the highest Court in Pennsylvania; and this can best be done by comparing the condition of the Company at the date of the Condoning Act with its condition on the 29th April, 1864, when the Repealing Act was passed.

Thus, the twenty-five miles of road, in use in 1856, had been extended from West Newton to Turtle Creek in 1864.

The dependence of the Pittsburgh and Connellsville Company for the transportation of its trains—and by this time it had trains to be transported—upon the Pennsylvania Rail Road Company had ceased,—for it had built a road of its own, ten miles long, from Turtle Creek to Pittsburgh, in which city it had acquired valuable real estate on the banks of the Monongahela, and erected capacious buildings for the accommodation of its business.

It had extended its road East of Connellsville to connect with a road, built by another Company, to Uniontown, twelve and a half miles distant, which road it had leased in perpetuity on advantageous terms, making the entire distance operated by it, at the commencement of the year 1864, some seventy-two miles. (See Record, p. 153.)

Instead of but two locomotive engines, two passenger cars and one baggage car, sixteen freight cars and seventeen gravel cars, it possessed twelve locomotives and a rolling stock to correspond.

It had induced Baltimore, soon after the passage of the Condoning Act, to exchange the bonds of the Company with the City's endorsement, which were comparatively unavailable, inasmuch as they could not be disposed of for less than par, for the City's own bonds, with an understanding which made them immediately applicable to the wants of the road. (See Record, p. 64.)

It had effected an arrangement by which the City agreed to waive its prior lien on the Turtle Creek division so as to permit $400,000 to be borrowed on a first mortgage on that portion of the work, thus affording the means for its construction. (See Record, p. 65.)

It had effected a further arrangement still, by which the City agreed to postpone its prior lien on the entire road, and all the rights and franchises of the Company, from Pittsburgh to Cumberland, in favor of parties willing to advance the means for the completion of the through line. (See Record, p. 64—5.)

In addition to this, it had secured the promise of $1,000,000 from the Baltimore and Ohio Rail Road Company in aid of the undertaking. (See Record, pp. 160, 161.)

It had the ability in 1864, as proved before the Jury, to borrow $20,000 a mile on a first mortgage, which, as we have seen, it had the privilege of giving on the entire line from Turtle Creek to Cumberland.

The extension of the road between 1856 and 1864, had been followed by an increase of the Company's business, which afforded evidence alike of the importance of the work and the excellence of its management.

It is in proof that, in 1856, its receipts for transportation did not meet its expenses. In 1857, there was a small profit. In 1858, this was slightly increased, but still fell within $1,000. In 1859, the gradual development of business produced a net earning of some $5,500. On the opening of the road to Uniontown, this rose to upwards of $21,000 in 1860 and 1861. In 1862, the Turtle Creek division was completed, and the clear profits were near

$40,000. In 1863, they were $95,228.89, and in 1864, the year of the Repealing Act, they had reached the sum of $101,568.72.

It is very true these gains were used to complete the road, to add to the rolling stock, to supply water stations and depot buildings, to pay the interest on the floating debt, and maintain generally the credit of the Company. So far, however, from this amounting to a misuse or abuse of the Company's means, it affords the best evidence of the zeal and intelligence with which it was prosecuting the work in hand.

Nor must it be forgotten that, besides the task of construction and equipment, there was a floating debt amounting on the 31st October, 1856, to $788,862, to be carried and reduced; and that of this there had been paid, in the interval between the Condoning and Repealing Acts, upwards of $700,000. See in regard to all these statements, the testimony of W. O. Hughart, in the Record at pp. 63, 64, 65, 66.

The circumstances of the times, during which the Pittsburgh and Connellsville Rail Road Company accomplished the results thus briefly enumerated, must not be overlooked.

Scarcely had the new administration taken charge of the work, before the Ohio Life and Trust Company failed, and those financial troubles began, which, spreading through the land, involved thousands in ruin and rendered unavailable even the best securities. Scarcely had credit begun to revive, after the crisis of 1857, before political difficulties arose. They culminated in the late war. This, for a season, paralyzed all branches of industry. No one could foresee the end. Rail road after rail road, yet unfinished, suspended operations. No one dreamed even of new enterprises; nor was it until the war fashioned the times into a strange sympathy with its requirements, and the enormous outlays which it caused, and the paper money which it created, gave a spur to enterprise, that business generally began to revive.

With regard to the effect of the crisis of 1857 and the political difficulties had on the rail road business, reference is had to the testimony, pp. 156, 157, 158, 159, and 176, 177 and 178 of the Record.

As is proven by the testimony of witness after witness, (see the testimony last referred to,) the Pittsburgh and Connellsville Rail Road Company, during all this long season of financial and political distress, never halted for a moment. Nor were its efforts

confined to applications to Western Roads, to Congress, to capitalists, to municipal corporations, to the Baltimore and Ohio Rail Road, (see p. 155 of Record,)—they were directed also to extending their road, to increasing its equipment, to providing it with water stations and depots, to the management of its slender finances with extremest economy—all of which is in the Record.

In the beginning of 1864, with a promise of a million of dollars from the Baltimore and Ohio Rail Road, with a money market, that as testified by one of the witnesses, would have afforded a loan of $20,000 (see evidence of H. B. Fry, Record, p. 178,) a mile on a first mortgage, such as the Company was authorized to give, with a net income increasing at a rate which justified the expectation of being able to meet the interest without other resources than might be derived from it,—the Pittsburgh and Connellsville Rail Road Company advertised for proposals to construct the entire line from Connellsville to Cumberland, of which the Sand Patch Tunnel, the heaviest portion of the work, was already more than half completed. (See Record, p. 155.)

At this time, while the contractors were awaiting the awards on their respective bids, preparing to go on with the work on the entire line, the Legislature of Pennsylvania, singling this one Company out from among all others, without enquiry even, regardless of what had been accomplished during eight long years of trial and distress,—regardless of the loss that might fall on Baltimore, whose means had been expended for the benefit of the citizens of Pennsylvania,—regardless of the honor and reputation of the Commonwealth—at this very time, the Legislature of Pennsylvania repealed the charter of the Pittsburgh and Connellsville Rail Road Company South and East of Connellsville, and bestowed the franchises resumed from the Defendants, by laws, which the Governor of the State could not bring himself to sign, but permitted to go into effect, without his name, under a constitutional provision. What a comment on the legislation of the State was not Governor Curtin's withholding his signature on this occasion.

As an apology for this act, the Legislature adopted a preamble to the law—the nine clauses of which contain but two charges against the Company,—to be found in the seventh, which recites: "that in the opinion of the Legislature, said corporation by the *delay*, referred to, and by the *embarrassments, financial and otherwise*, in which said corporation have become involved, have mis-

used and abused the powers by said Act (the Charter and its Supplements) conferred."

By referring, however, to the definition of "misuse or abuse" given in a previous part of this brief, it will be seen that the Legislature of Pennsylvania undertook to repeal the charter of the Pittsburgh and Connellsville Rail Road Company on grounds which the Supreme Court of Pennsylvania, in the case of the Erie and North-East Rail Road Company against Casey, had decided solemnly not to be tenable ! ! !

There is no law upon the statute book that has not had its origin in some evil to be remedied, some good to be effected, some want to be supplied, some purpose to be gained,—and a little trouble—a little investigation into cotemporaneous circumstances, will generally enable the curious in such matters to trace each act of legislation to some individual source. In this particular case, there is no difficulty in arriving at the origin of the Repealing Law. Baltimore and Philadelphia had long been rivals for the Western trade. Baltimore's geographical proximity to the Ohio at Pittsburgh gave it the advantage while turnpikes were the best known modes of communication. When Pennsylvania's canals, cheapening transportation, counterbalanced the advantage of the shorter distance, Baltimore, hopeless as regarded canals, resorted to rail roads. Philadelphia followed her example; and in a generous and honorable rivalry, all the while, Baltimore completed her road to the Ohio at Wheeling, and Philadelphia hers to Pittsburgh about the same time, in 1853. The energy, devoted to these great undertakings, released from the trunk lines, spread itself laterally as it were; and it was in 1853, that Pittsburgh renewed her exertions, that the city of Baltimore guaranteed the bonds so often spoken of, and that the work of the Pittsburgh and Connellsville Rail Road was really commenced by the surveys that preceded its construction. It was a small and feeble beginning, however, after all, and year after year elapsed before it attracted attention or aroused jealousy in any quarter. When the Condoning Act was applied for, no one thought it worth while to propose a Repealing Law in its place, when there might have been some pretext for its passage. The Company was permitted to stagger along through the crisis of 1857, through the perilous times of the war, unnoticed and unfeared; but when it actually called upon contractors to complete the through line,—when the Pennsylvania Rail Road saw a competitor and rival on the eve of coming into existence, and found that the Pittsburgh, Fort Wayne

and Chicago Road, the Cleveland and Pittsburgh Road, the Steubenville Road, the Allegheny Valley Road, instead of being confined to the Pennsylvania Road in forwarding passengers and freight to the sea-board, would have another route by the Pittsburgh and Connellsville and the Baltimore and Ohio Roads, it undertook to crush out the threatened competition with the weight of the Legislature of Pennsylvania: and the Legislature of Pennsylvania lent itself to its great Corporation; and we are now before the Courts for the purpose of seeing whether the law is not more powerful than both.

The City of Baltimore is the Plaintiff here, because she is the mortgagee to which the Pittsburgh and Connellsville Rail Road Company has pledged its entire franchise, extending from Pittsburgh to the Maryland line, as a security for a million of dollars, with interest thereon for nearly half a million more. It is here, because the Legislature of Pennsylvania has attempted to take from Baltimore so much of her security as is to be found South and East of Connellsville. The Connellsville and Southern Pennsylvania Rail Road Company is made a Defendant, because it has pleased the Legislature of Pennsylvania to give to that corporation what it has attempted to take from the other,—and the Pittsburgh and Connellsville Rail Road Company is made a Defendant, because of its interest as mortgagor, and who, by colluding with the co-Defendant, might give to the illegal act complained of an effect which it could not otherwise possess, and the suit is brought in the Circuit Court of the United States, because it was established for the very purpose of deciding questions between citizens of different States, without being suspected of local partialities.

This is the fifth time this case has been before a legal tribunal. First, at Williamsport, upon a demurrer; which, admitting the facts, denied that they entitled the Complainants to the injunction that they asked for;—again, at Philadelphia, when, the Defendants withdrawing the demurrer and filing an answer, the Complainants admitted the truth of the facts alleged by the Defendants, but insisted, nevertheless, upon the redress they claimed. On this occasion it was, that the Court gave permission to have an issue to try the fact of misuse and abuse, at its May Term, if, in the meanwhile, the State had not prosecuted to a close, certain proceedings, which, under the same influences, had been instituted to try the same questions in the Supreme Court of Pennsylvania. These proceedings being still in abeyance, at May

Term—there the issue was tried before a jury; and we are here now on appeal from the final decree that followed the verdict.

To recapitulate,

1. It is insisted that the Repealing Act, so called, passed by the Legislature of Pennsylvania on the 29th April, 1864, is unconstitutional and void—inasmuch as it is a law impairing the validity of the contract made between the Legislature and the Pittsburgh and Connellsville Rail Road Company, when the charter of the latter was granted.

2. If the Repealing Act is not absolutely null and void, it is valid *prima facie* only, and the exercise of the power to repeal, given by the 20th section of the original charter, does not prevent the Company from appealing to the Courts, for the purpose of showing that there was no such misuse or abuse as could alone justify the exercise of the repealing power.

3. That in the alternative view of the case, the Act of the Legislature of Pennsylvania of 11th April, 1856, was a condonation of all acts of misuse or abuse prior to its date; and that in maintaining the issue on their part, the Pittsburgh and Connellsville Rail Road Company are not bound to do more than to prove that they have been guilty of neither misuse nor abuse between the date of its passage and the date of the Repealing Act.

4. That under their charter and its supplements, the Pittsburgh and Connellsville Rail Road Company were authorized to construct a road to the State line of Pennsylvania, there to meet and unite with a road in the State of Maryland from Cumberland to that point, and so forming a continuous line from Connellsville to Cumberland, and that, having this right, acts done or contemplated in the exercise of it cannot be regarded as acts of misuse or abuse.

5. That to constitute an act of misuse or abuse, it must be a positive act of malfeasance—which must be wilful, and something more than accidental negligence, excess of power, or mistake in the mode of exercising an acknowledged power.

6. That according to the proper definition of the term "misuse or abuse," the evidence shows that no acts amounting thereto have been committed by the Pittsburgh and Connellsville Rail Road Company; and that this being so, assuming the *prima facie* validity of the Repealing Act, the Appellees are entitled to an affirmance of the decree in the Court below, declaring it to be unconstitutional and void.

JOHN H. B. LATROBE,
REVERDY JOHNSON,
JOHN L. THOMAS,
For the Appellees.

APPENDIX.

AN ACT *Supplemental to the Acts incorporating the Pittsburgh and Connellsville Rail Road Company.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That any defect or irregularity in the proceedings of the commissioners appointed by the several acts of Assembly incorporating the Pittsburgh and Connellsville Rail Road Company, in taking subscriptions to and organizing said Company, and any defect or irregularity in the proceedings of the Board of Directors of said Company, in organizing and conducting the affairs of the same, so far as the said defect or irregularity may have proceeded from the neglect or omission of the said Commissioners or Board of Directors fully to comply with the requisitions of the said acts of incorporation and their supplements, be and the same is hereby remedied and supplied; and that the charter of incorporation of said Company shall not be affected or invalidated in consequence of such omission or neglect, by said Commissioners or Board of Directors to comply fully with its requirements.

SECTION 2. That whenever it shall be necessary for said Company to enter in and upon and occupy, for the purpose of making said rail road, any land upon which the same may located, if the owner or owners of the land shall refuse to permit such entry or occupation, and the parties cannot agree on the amount of damages claimed, the Company shall tender a bond, with sufficient security, to the party claiming the damages, the condition of which shall be, that the Company will pay or cause to be paid such amount of damages as the party shall be entitled to receive, after the same shall have been agreed upon by the parties, or assessed agreeably to the provisions of the Act of Assembly prescribing the mode of ascertaining the same. That in case the party or parties claiming damages refuse to accept the bond as tendered by the Company, the Company shall, in every such case, present the bond to the Court of Common Pleas of the proper county, and if the Court approve of the security, shall direct the same to be filed for the benefit of those to whom it is given, which bond shall be answerable, as all other debts, for the amount of the damages assessed, if the same be not paid in a reasonable time after such assessment; and the said Company, their agents or contractors for making or repairing the said road, may immediately enter upon and use the said land, without awaiting the issue of the proceedings to determine the damages.

SECTION 3. That in all cases where viewers have been or may hereafter be appointed, in pursuance of the Acts of Assembly relating to said Company, for the purpose of assessing damages, one or more of said viewers shall have power to adjourn from day to day, and a majority of the said viewers so appointed shall have power to view and assess damages and report as fully and with like effect as though all were present: *Provided,* That a penalty of ten dollars be imposed on any of the said viewers who shall neglect or refuse to attend, after appointment and due notice, at the time and place named, unless unavoidably prevented, said penalty to be recoverable before any justice of the peace as debts of similar amount are recoverable, for the use of the person sueing for the same.

RICHARDSON L. WRIGHT,
Speaker of the House of Representatives.
WM. M. PAITT,
Speaker of the Senate.

Approved 11th April, 1856.

JAMES POLLOCK.

A SUPPLEMENT *to an Act relating to Corporations.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That so much of the act to which this is a supplement as prohibits the election of a non-resident of this State to the office of President of any Rail Road Company incorporated by this commonwealth, be and the same is hereby repealed, so far as relates to the Pittsburgh and Connellsville Rail Road Company; and the official acts of the President and Board of Directors of said Company, previous to the passage of this act, shall not be impaired or affected by reason of the said President not being a resident within this State.

J. M. B. PETRIKIN,
Speaker of the House of Representatives
FRANCIS GORDON,
Speaker of the Senate.

Approved 22d January, 1857.

JAMES POLLOCK.

A SUPPLEMENT *to an Act to Incorporate the Pittsburgh and Connellsville Rail Road Company.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That the proviso to the sixteenth section of an act to incorporate the Pittsburgh and Connellsville Rail Road Company, approved the 3d day of April, 1837, be and the same is hereby repealed.

JOHN CESSNA,
Speaker of the House of Representatives.
GEORGE V. LAWRENCE,
Speaker of the Senate.

Approved 11th April, 1863.

A. G. CURTIN.

A SUPPLEMENT *to an Act to Incorporate the Safe Harbor and Susquehanna Turnpike Road Company, et cetera.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That all the provisions of the sixth section of an Act to Incorporate the Safe Harbor and Susquehanna Turnpike Road Company, et cetera, approved the 18th day of April, A. D. 1853, are hereby extended to and shall embrace the counties of Fulton and Franklin, for all the purposes mentioned in said section.

JOHN CESSNA,
Speaker of the House of Representatives.
GEORGE V. LAWRENCE,
Speaker of the Senate.

Approved 14th April, 1863.

A. G. CURTIN.